

CONSTITUTIONAL RELIGIOUS PROTECTION: ANTIQUATED ODDITY OR VITAL REALITY?

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The common tendency to define religion in terms of a single type of religion, implicitly rejecting all other cults as nonreligious, may be observed in any group of otherwise intelligent people.¹

The public schools in New Haven, Connecticut, in cooperation with a private insurance company, offer student accident insurance for those students whose parents wish to purchase it. The "School-Time" plan also insures the child for accidental bodily injury "while attending religious service or instruction, including travel directly between such service or instruction and home or school." Johnnie Doe's parents enroll him in this plan. Johnnie is hit by a car on the way to attend a Junior Atheism and Philosophical Society meeting. Johnnie's parents attempt to collect under the policy. Would the insurer be justified in refusing to pay on the ground that Johnnie was not traveling to a "religious service or instruction"?

By virtue of the Civil Rights Act of 1964, it is an unlawful employment practice for a covered employer to discriminate against an employee or job applicant because of the employee's or applicant's religion.² However, religious and educational bodies are exempt from this requirement in that they may employ persons of a particular religion to perform work connected with their religious or educational activities.³ What organizations and enterprises would qualify for this exemption by virtue of their being "religious" in nature? By what criteria are they to be identified as such? And what aspects of employees' moral and ideological beliefs, personal lives, and even personality traits are matters of religion and thus not to be considered by covered employers in their hiring, firing, and other job decisions? Again, by what criteria should the law determine what in a person's life involves his religion and what does not?

Suppose that in your state a statute provides that a physician may refrain on religious grounds from performing a legal abortion on his patient without being criminally or civilly liable for any injury that may result to the patient from his refusal. Patient Jane Doe requires an emergency abortion to save her life. Her physician, Dr. John Smith, is the only available doctor in their remote community, and there isn't time to transport

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¹ K. DUNLAP, RELIGION: ITS FUNCTION IN HUMAN LIFE 3 (1946) [hereinafter referred to as K. DUNLAP].

² 42 U.S.C. § 2000e-2(a) (1970).

³ *Id.* § 20003-1.

Jane elsewhere. Dr. Smith refuses to perform the operation, feeling deeply that to destroy an unborn child would morally constitute murder. As a result, Jane dies. On the question of the doctor's immunity from liability, should it matter whether he: (1) was a member of a religious sect that officially views the intentional taking of an unborn life under any circumstances as being contrary to divine law; or (2) was a self-proclaimed agnostic, with an often expressed hostility for "all religions" as being "a curse to human progress," who sincerely feels that medical science ought never presume to sacrifice one life to preserve another?

The above examples suggest the need for a *legal definition of religion*. They further suggest that this need is not confined to the more noticed areas of "church and state" concerns such as state aid to parochial schools and school prayer and Bible reading. The problem of legally defining religion can arise in virtually any area of the law at any level of government.

Another way of describing the problem is to ask: What does the first amendment to the United States Constitution mean by "religion" when it says, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"? In the United States, the quest for a legal definition of religion and the quest for the meaning of religion in the first amendment are essentially the same for this reason: If the federal government or a state were to define religion more restrictively than contemplated by the first amendment, a party aggrieved by the more restrictive definition (by being denied some benefit or immunity accorded those who did meet its more rigid requirements) would have a constitutional objection to the federal or state action. This objection would rest on the establishment clause and, depending on the facts, could rest on the free exercise clause as well.⁴ Thus the quest for a legal definition of religion must be a quest for a *constitutionally valid* legal definition. And "constitutional validity" requires a legal definition of religion at least as nonpartisan, that is, at least as inclusive, as that of the religion protected by the first amendment. For most purposes it therefore makes sense to speak of a legal definition and a constitutional definition of religion interchangeably. This essay will do just that.

Since *religion* in the first amendment does not define itself, we must

⁴ Although originally applicable only to the federal government, both the nonestablishment and religious freedom clauses are now also applicable to the respective state governments by virtue of the fourteenth amendment. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (applying the religious freedom guarantee to the states); *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203 (1948) (applying nonestablishment to the states). Where no governmental action is involved, the Constitution does not appear to prohibit the use of a highly restrictive definition of religion in dealings between private parties. Such "private" definitions, even if encompassed in a legally enforceable contract, are excluded from this essay's considerations, its scope being confined to seeking a legal definition of a religion that can be utilized by government itself. The "government" versus "private" demarcation is, of course, no easy task. See, e.g., *Shelley v. Kraemer*, 334 U.S. 1 (1948).

finally depend on the United States Supreme Court to insure that religion is defined so as to maximize the constitutional values of genuine religious freedom and nonestablishment. Using these values as the basis for its assessment, this essay will analyze and evaluate recent progress by the Court toward a satisfactory definition of religion. The analysis and evaluation will both draw upon the views of other commentators in the church and state arena and offer this essay's own constructive position on legally defining religion.

I. THE UNITED STATES SUPREME COURT AND THE DEFINITIONAL PROBLEM

The matter of defining religion has been noticed by the United States Supreme Court in dealing with the first amendment,⁵ though much less often than might be expected. One federal court has suggested that the Supreme Court "appears to have avoided the problem with studied frequency in recent years."⁶ Whether or not that is so, the most fruitful contribution by the Supreme Court toward a first amendment definition of religion has not occurred from an explicit attempt to formulate one. Rather, the Court's contribution has been made indirectly, and probably unintentionally, by its interpretation of § 6(j) of the Universal Military Training and Service Act of 1948⁷ in *United States v. Seeger*⁸ and, five years later, in *Welsh v. United States*.⁹

The pertinent language of that section of the Act reads as follows:

Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code.¹⁰

Since § 6(j) provides an exemption from combatant military conscription only for *religiously grounded* conscientious objectors, the matter of defining religion or, more accurately, "religious training and belief" in §

⁵ E.g., *McGowan v. Maryland*, 366 U.S. 420, 465-66 (1961) (Frankfurter & Harlan, JJ., concurring); *United States v. Macintosh*, 283 U.S. 605, 633-34 (1931) (Hughes, C.J., dissenting); *David v. Beason*, 133 U.S. 333, 342 (1890).

⁶ *United States v. Kuch*, 288 Supp. 439, 443 (D.D.C. 1968).

⁷ Ch. 625, § 6(j), 62 Stat. 612 (1948), as amended 50 U.S.C. § 456(j) (App. 1970).

⁸ 380 U.S. 163 (1965).

⁹ 398 U.S. 333 (1970).

¹⁰ This quoted language from § 6(j) of the Act was amended in 1967 so as to delete the reference to a "Supreme Being." Act of June 30, 1967, Pub. L. No. 90-40 § 7, 81 Stat. 104, amending 50 U.S.C. § 456(j) (App. 1964). Both *United States v. Seeger* and *Welsh v. United States* were decided with respect to the pre-1967 version of § 6(j) as quoted above in the text.

6(j) is of obvious importance. An operative definition of religion will determine which conscientious objectors who otherwise meet the statutory requisites are includable in the provided exemption from combatant training and service.¹¹

The Congressional definition of "religious training and belief," quoted above, contains both a positive and a negative component. The positive component requires "belief in a relation to a Supreme Being involving duties superior to . . . any human relation." The negative component excludes "essentially political, sociological, or philosophical views or a merely personal moral code." Obviously, to read "belief in a relation to a Supreme Being" as requiring belief in a supernatural deity raises a serious establishment of religion problem, and probably a free exercise problem as well.¹² This illustrates the ever present dilemma of any legal definition, constitutional or otherwise. If the definition is *too narrow*, its application in a rule of law may violate one or both of the first amendment religion clauses by excluding those religions not satisfying the definition from whatever benefit or immunity the particular law provides.¹³ And yet, it is apt to be asked, *how broadly* must we legally define religion to satisfy the first amendment? Potentially, anything and everything could qualify as religion in someone's subjective reference. The fear exists that, with such potential, the first amendment religion clauses could encompass so much of human experience as to undermine the state's necessary sphere of social control.¹⁴ Conversely, first amendment religion might mean nothing in a practical sense if judicial restraint in applying so broad a definition were the final product.

A. *United States v. Seeger*

The "too narrow" side of this definitional dilemma confronted the Court in *United States v. Seeger*. Daniel Andrew Seeger had been convicted in district court¹⁵ for refusing to submit to induction in the armed forces. His claim for conscientious objector status had been denied solely

¹¹ Additionally, § 6(j) provides for "civilian work contributing to the maintenance of the national health, safety, or interest" if the person's religiously based conscientious objection extends to noncombatant military service as well. 50 U.S.C. § 456(j) (App. 1970).

¹² The Court had already recognized the existence in America of religions that "do not teach what would generally be considered a belief in the existence of God." *Torcaso v. Watkins*, 367 U.S. 488, 495n. (1961).

¹³ The Supreme Court itself may violate the Constitution by positing a constitutional definition of religion or by upholding a statutory definition, either of which fails to do justice to the theological neutrality required by both religious clauses. As Justice Jackson rightly confessed, "We are not final because we are infallible, but we are infallible only because we are final." *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

¹⁴ See *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 658-59 (1943) (Frankfurter, J., dissenting).

¹⁵ *United States v. Seeger*, 216 F. Supp. 516 (S.D.N.Y. 1963), *rev'd*, 326 F.2d 846 (2d Cir. 1964), *aff'd on other grounds*, 380 U.S. 163 (1965).

because it was not based on "belief in a relation to a Supreme Being;" therefore, according to § 6(j), Seeger's opposition to war was not "by reason of religious training and belief." Despite a strong factual indication to the contrary,¹⁶ the Court determined that Congress' intent was *not* to confine belief relating to a "Supreme Being" to belief "in a traditional God."¹⁷ Accordingly, the Court sought to define the positive component in the Act's definition of "religious training and belief" broadly enough to include *all* religions.¹⁸ The Court did so by construing religious belief "in a relation to a Supreme Being" as belief "that is sincere and meaningful [which] occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption."¹⁹ But what class of beliefs can be said to occupy a place in the believer "parallel to that filled by the orthodox belief in God"? Apparently, it would be "all sincere religious beliefs which are based upon a power or being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent."²⁰ This would include "externally and internally derived beliefs."²¹ (The statutory term "training" in "religious training and belief" therefore seems to have been disregarded.²²) In Seeger's case then, as well as in the two other cases consolidated with his for argument, § 6(j) was thus construed broadly enough to include these men as religiously grounded conscientious objectors, invalidating their convictions in the district courts for refusal to submit to military induction.²³

The following points must initially be conceded: first, the *Seeger*

¹⁶ See *Welsh v. United States*, 398 U.S. 333, 348-54 (1970) (Harlan, J., concurring).

¹⁷ *United States v. Seeger*, 380 U.S. 163, 178 (1965).

¹⁸ *Id.* at 165.

¹⁹ *Id.* at 165-66; see also *id.* at 183-84, 176. Unlike the first two passages cited, which speak of the place filled by orthodox belief in God, the passage at 176 speaks of the place filled "by the God of those admittedly qualifying for the exemption." The *Seeger* Court's language may be compared with the following earlier effort toward a definition of religion by a state court:

Thus the only inquiry . . . is the objective one of whether or not the belief occupies the same place in the lives of its holders that the orthodox beliefs occupy in the lives of believing majorities, and whether a given group that claims the [tax] exemption conducts itself the way groups conceded to be religious conduct themselves. The content of the belief, under such test, is not a matter of governmental concern.

Fellowship of Humanity v. County of Alameda, 153 Cal. App. 2d 673, 692, 315 P.2d 394, 406 (1957) (lack of theistic belief does not disqualify nonprofit corporation for tax exemption on property used for religious worship).

²⁰ 380 U.S. at 176. This language just quoted may be said to be the "substance" of the Court's definition of religious belief or belief in relation to a Supreme Being. It assigns content to the merely formal "place parallel to that filled by the [traditional] God" by telling *what place*.

²¹ *Id.* at 186.

²² Otherwise, serious first amendment problems would exist in excluding from § 6(j) any religion(s) without overt communal indoctrination.

²³ The court of appeals' reversals of Seeger's and Jakobson's district court convictions, *United States v. Seeger*, 326 F.2d 846 (2d Cir. 1964), and *United States v. Jakobson*, 325 F.2d 409 (2d Cir. 1963), were thus affirmed. The court of appeals' affirmance of Peter's conviction in *Peter v. United States*, 324 F.2d 173 (9th Cir. 1963), was therefore reversed.

Court's definition of "religious training and belief" was produced by construing an act of Congress (but undeniably with the aim of saving the statute's constitutionality!); second, "religious belief" (forgetting the now inoperative term "training") may not necessarily be synonymous with the broader term "religion." Despite these concessions, one ought still ask this question: Is the definition in *Seeger*, regardless of the Court's original purpose, a step toward a general definition of religion as used in the first amendment? If it is, there are at least two readily apparent problems in the *Seeger* formula.

The first problem involves the negative component in the § 6(j) definition of religious belief. This component, which the *Seeger* Court purported to have upheld, excluded "essentially political, sociological, or philosophical views or a merely personal moral code" from religious training and belief. This exclusion is utterly inconsistent with the Court's positive description of religious beliefs. Political, sociological, philosophical and "personal moral" convictions can function in one's life so as to occupy a place "parallel to that filled by the orthodox belief in God." They can subjectively function as "a faith, to which all else is subordinated or upon which all else is ultimately dependent." Though it failed to resolve it, the Court in *Seeger* does appear to have been aware of the inconsistency. In describing what beliefs are religious beliefs, the Court felt compelled to include only "all sincere *religious* beliefs which are based upon a power or being, or upon a faith, to which all else is subordinate . . ." ²⁴ It had to use the limiting adjective "religious" in defining "religious beliefs" in order to adhere verbally to the act's exclusion of political, sociological, philosophical and personal, moral views!

The second difficulty, which may be but another way of describing the first, is this: It is not clear whether the Court was positing a totally subjective standard for religious belief or whether there is still some required dimension (however broad) concerning the belief's objective content. The Court itself did not clarify this matter when it stated as follows:

While the applicant's words may differ, the test is simple of application. It is essentially an objective one, namely, does the claimed belief occupy the same place in the life of the objector as an orthodox belief in God holds in the life of one clearly qualified for exemption?²⁵

The test may be deemed "essentially an objective one" in that the factfinder rather than the claimant of the exemption makes the ultimate determination. But what does the factfinder determine? Is it simply *how important the belief is to the claimant* that determines whether it fills a place parallel to orthodox belief in God? Or must there be some content *to the*

²⁴ 380 U.S. at 176 (emphasis supplied).

²⁵ *Id.* at 184.

object or grounds of the claimant's belief that can be deemed parallel to orthodox belief in God?

Mansfield opts for the latter conclusion, arguing that intensity of belief is not enough.²⁶ The truths believed should "address themselves to basic questions about the nature of reality and the meaning of human existence"²⁷ This, he argues, constitutes the primary reason for characterizing them as religious. However, there are indications in *Seeger* that the Court's test for religious beliefs is more subjective than Mansfield concludes. First, the registrant's own claim "that his belief is an essential part of a religious faith must be given great weight."²⁸ Second, the registrant's own "faith" rather than some "power or being" may be the basis of religious belief.²⁹ Third, local boards and courts are not even free to reject beliefs they find "incomprehensible."³⁰ Rather, says the Court in *Seeger*, "[t]heir task is to decide whether the beliefs professed by a registrant are sincerely held and whether they are, *in his own scheme of things*, religious."³¹ But how could a board or court ascertain the objective religious content of an incomprehensible belief? These statements can hardly be said to resolve the difficulty clearly in favor of finding religious belief purely on the basis of the registrant's sincerity and intensity of commitment. What then, if any, is the rudimentary content requirement concerning the ground or object of a belief in order for it to be deemed religious?

B. *Welsh v. United States*

The above two (and any other) difficulties with the *Seeger* understanding of religious belief remained unmet by the Supreme Court until *Welsh v. United States*, which, by vote of five justices to three, invalidated petitioner's conviction for refusing to submit to military induction.³² In his conscientious objector's application, Seeger had struck out "training and," and placed quotation marks around the word "religious" on the printed Selective Service form.³³ Elliott Ashton Welsh, II, struck out "religious training and," thus his application claimed conscientious opposition to war "by reason of my belief."³⁴ Welsh was denied a § 6(j) conscientious objector exemption because his appeal board and the Department of Justice hearing officer "could find no religious basis for the registrant's be-

²⁶ Mansfield, *Conscientious Objection—1964 Term*, 1965 RELIGION AND THE PUBLIC ORDER 3, 9-10. See also *id.* at 29.

²⁷ *Id.* at 10.

²⁸ 380 U.S. at 184.

²⁹ *Id.* at 176.

³⁰ *Id.* at 184-85.

³¹ *Id.* at 185 (emphasis supplied).

³² 398 U.S. 333 (1970), *rev'g* 404 F.2d 1078 (9th Cir. 1968).

³³ The printed form read as follows: "I am, by reason of my religious training and belief, conscientiously opposed to participation in war in any form." *Id.* at 336-37.

³⁴ *Id.*

lief, opinions and convictions."³⁵ Like Seeger, Welsh claimed to have sincere and deeply felt conscientious scruples against killing in war. The government conceded that Welsh's beliefs were "held with the strength of more traditional religious convictions,"³⁶ but it sought, unsuccessfully at the Supreme Court level, to have upheld the "no religious basis" finding of the lower court and Welsh's consequent conviction for refusing induction by distinguishing the *Welsh* facts from *Seeger* on two grounds.³⁷

First, it was argued that, unlike Seeger, Welsh had explicitly denied that his views were religious. Justice Black, writing the four Justice plurality opinion, parried that argument by concluding that Welsh was thinking of "religious" in the narrower conventional sense rather than the "broad scope" of that word as contemplated by § 6(j).

The second and more important ground argued by the government was that Welsh's beliefs were "essentially political, sociological, or philosophical views or a merely personal moral code." If so then even under the *Seeger* interpretation of § 6(j), Welsh would not qualify for the exemption. In denying the validity of this argument, the plurality opinion conceded that Welsh's conscientious objection was in part based on his perception of world politics, quoting from a letter by Welsh to his local board.³⁸ It reasoned, however, that the § 6(j) exclusion of views essentially political, etc., should *not* be read "to exclude those who hold strong beliefs about our domestic and foreign affairs *or even those whose conscientious objection to participation in all wars is founded to a substantial extent upon considerations of public policy.*"³⁹

What then is left in the § 6(j) exclusion, the negative component of the Act's religious belief definition? Justice Black's answer would seem to be contained in the language of this passage:

The two groups of registrants that obviously [*Quaere*, are there others less obvious?] do fall within these exclusions from the exemption are [1] those whose beliefs are not deeply held and [2] those whose objection to war does not rest *at all* upon moral, ethical, or religious principle but instead rests *solely* upon considerations of policy, pragmatism, or expediency.⁴⁰

The *Welsh* plurality opinion, as exemplified by the foregoing passage, is something less than lucid in stating just how it has refined the interpretation of § 6(j)) from the Court's original formulation in *Seeger*. The opinion's reluctance to display undue clarity here may well be produced by an awareness that the clearer the opinion, the more obvious is the extent

³⁵ *Id.* at 338.

³⁶ *Id.* at 337, quoting from 404 F.2d 1078, 1081 (9th Cir. 1968).

³⁷ *Id.* at 340-44, which includes the response to both grounds in Justice Black's plurality opinion, joined in by Justices Douglas, Brennan and Marshall.

³⁸ *Id.* at 342.

³⁹ *Id.* (emphasis supplied).

⁴⁰ *Id.* at 342-43 (emphasis supplied).

of the reworking of § 6(j) that was required in order to make it coherent and constitutional.⁴¹ Although the opinion refuses to say so explicitly, it seems to have cured the inconsistency of excluding "essentially political, sociological, or philosophical views or a merely personal moral code" from the otherwise broad *Seeger* definition of religious belief simply by denying this § 6(j) exclusion any real effect. This conclusion seems warranted in that the opinion only requires that the registrant's beliefs: (1) be deeply held; and (2) rest at least in part upon moral, ethical, or religious principle.⁴² Therefore, it seems that within the opinion's broad delineation of religious belief there should be included conscientious objection to participation in war even if the objection rests on wholly "political views" or wholly "sociological views" or wholly "philosophical views" or "a merely personal moral code," provided only that these views function in the believer analogously to traditional orthodox belief in God, eliciting a deep and profound commitment in the registrant's life. Any of the above categories of views which imposes upon an individual a duty of conscience to refrain from participating in war at any time would, in this context, have to qualify (at least in part) as moral or ethical principles. In the context of a conscientious objection to war (or any other behavior commanded by the state), views that compel one's objection must of necessity be based in part on moral or ethical considerations. Further support for the reading here espoused is the opinion's statement (again without excess clarity) that "these exclusions [essentially political views, etc.] are definitional and *do not therefore restrict the category of persons who are conscientious objectors by 'religious training and belief.'*"⁴³

The exclusion of views "essentially political," etc., has thus lost any special meaning and only has effect, along with all other views (of whatever type), with respect to Justice Black's description, quoted earlier, of the two groups of registrants which are still to be excluded. For example, registrants with views having a philosophical basis but not deeply held would fit Black's first group of the "obviously" excluded. But so too would registrants with views having a traditional religious origin and content if they were not deeply, that is "religiously," felt.

⁴¹ It is a small wonder that Justice Harlan, the fifth Justice voting against the validity of Welsh's conviction, felt constrained to do so by declaring the "religious training and belief" requirement in § 6(j) unconstitutional rather than by the plurality's approach of reworking the proviso.

⁴² 398 U.S. at 342-44.

⁴³ *Id.* at 343 (emphasis supplied).

Further, [o]nce the Selective Service System has taken the first step and determined under the standards set out here and in *Seeger* that the registrant is a "religious" conscientious objector, it follows that his views cannot be "essentially political, sociological, or philosophical." Nor can they be a "merely personal moral code."

Id. In other words, even if the source and content of his views are, *e.g.*, political, we won't deem them as "political" for purposes of the § 6(j) exclusion from religious belief if the positive component of the religious belief definition is met. Thus the exclusion becomes mere verbiage.

Whom Black means to place in the second group of those excluded is quite unclear. Their objection to war, though deeply felt (else they would fit the first group of excluded registrants), somehow "does not rest at all upon moral, ethical, or religious principle but instead rests solely upon considerations of policy, pragmatism, or expediency."⁴⁴ Whom does this exclude? Moral or ethical principles involve taking into account one's assessment of the good and evil aspects of behavior (using whatever standards of good and evil to which one adheres⁴⁵). But so do considerations of "policy, pragmatism, or expediency." Any given instance of these latter judgments may be criticized as being immoral (or amoral) according to any given set of ethical criteria, but such in no way distinguishes them from "moral" or "ethical" judgments, which may be criticized on the same grounds. Surely the opinion does not mean to grant objector status to a registrant who wholly or partly reaches his position emotionally, intuitively, supernaturally, or dogmatically "on principle," and to deny such status to one whose deeply felt (and thus religiously felt) views were solely the result of an open-minded assessment of empirical data and a rational weighing of alternatives or the result of a purely consequential or "pragmatic" type of ethics.⁴⁶ Such would be the very kind of religious discrimination *Seeger* and the five Justice majority in *Welsh* were seeking to avoid. This anti-discriminatory stance argues against our supposing that the *Welsh* plurality opinion was suggesting some tenuous distinction between "moral principle" and pragmatic "policy considerations" as such.

Instead, it is less implausible to understand Black's second group of registrants denied conscientious objector status as being comprised of those who are claiming exemption for the baser reason of self-preservation. This is indeed a big jump from any explicit language in the opinion, but who else is left to give any composition at all to Black's "obviously excluded" second group? If only in desperation, then, objection to participation in war based "solely upon considerations of policy, pragmatism, or expediency" could be understood to refer to the concerns of one who is objecting simply in order to avoid *for himself* the hardships and risk of death and injury that necessarily accompany combatant service. This second group of "obviously excluded" registrants would then involve the stereotype pseudo-conscientious objector to whom any board is determined to deny § 6(j) status. In many cases this person would be excluded because

⁴⁴ *Id.* at 342-43.

⁴⁵ See generally W. FRANKENA, *ETHICS* (1963).

⁴⁶ Unlike the situation in *Gillette v. United States*, 401 U.S. 437 (1971), here there are no plausible "valid neutral reasons" for such religious discrimination. *Gillette* upheld the "de facto discrimination among religions" caused by § 6(j)'s granting objector status only to those opposed to *all* wars because of the arguably real difficulty of "fairness and evenhanded decision-making" in administering a system of selective conscientious objection exemptions. Here, however, no such difficulty exists; no matter how utilitarian or "pragmatic" are the objector's grounds, he would still be "conscientiously opposed to participation" in war *in any form*.

he does not hold beliefs deeply (Black's first group). But he is not necessarily excluded for this reason. One's concern for his own safety could well meet the *Seeger* test of supreme importance to which all else is subordinate, that is, the self could function subjectively as one's "Supreme Being." This would in a sense be the one "religion" that the *Welsh* plurality opinion would not recognize for exemption.

If the foregoing explication of the four Justices' refinement in *Welsh* of the *Seeger* definition of § 6(j) "religious training and belief" is substantially correct, then both of the earlier discussed difficulties in the *Seeger* formulation have been considerably lessened. The first difficulty, the retention in *Seeger* of the act's arbitrary and illogical exclusion of "essentially political views," etc., from "religious belief," has been met by making the exclusion inoperative, provided the views are held with religious intensity. The second difficulty, the ambiguity concerning whether there is any requirement for the content of the belief in order for it to be religious, seems to have been pushed toward a more subjective approach. Indeed, the beliefs need not be objectively "religious" at all (whatever that might mean to whoever is making such a determination); they may be "purely ethical or moral in source and content."⁴⁷ Although this latter language may itself be said to constitute some content requirement, it adds nothing to the requirement that the objection be conscientious, *i.e.*, having to do with one's conscience, with one's own view of rightness and wrongness. Hence the need for a belief to meet any content requirement concerning *what one believes*, in order for it to be deemed a religious belief under § 6(j), is becoming unnecessary. Because of the danger of excluding religions that do not meet whatever object content requirement might be formulated, this is a favorable development — one very much in harmony with the first amendment religion clauses.

II. THE KEY CRITERION OF AN ADEQUATE DEFINITION: DESCRIPTIVE OR "NEUTRAL" RATHER THAN NORMATIVE

There is one possible exception to the *Welsh* plurality's otherwise general lack of any restriction upon a belief's object content, allowing it to qualify as a § 6(j) religious belief. The exception, already suggested, involves the objector who is "religiously" concerned with saving his own skin. One's immediate reaction to such a case, if he feels that such a person should be denied an exemption,⁴⁸ is to base the denial on the ground that the person is not a *conscientious* objector. Yet such an objection may well be a matter of conscience. The registrant may well be making a moral judgment that his own life is worth more than the cause for which he is

⁴⁷ 398 U.S. at 340.

⁴⁸ A debatable but highly pragmatic ground exists for granting even this registrant an exemption; one who is "religiously" terrified of combat may well be a liability to the cause.

called to fight.⁴⁹ This ethical judgment may be right or wrong, moral or immoral, yet still a "conscientious" objection.

Perhaps such a registrant's claim for § 6(j) exemption is more logically open to rejection because it (arguably) is not religious. True, it is "religiously" felt. But it might be said to lack any rudimentary religious content in the following sense: *If* there can be said to be any common characteristic to human religious behavior⁵⁰ other than a subjective commitment by the adherent, it would seem to be that the object of one's religious commitment is something (real or imaginary) *other than merely one's self*. For example, consider Carl Jung's general definition of religion:

Religion, as the Latin word denotes, is a careful and scrupulous observation of what Rudolf Otto aptly termed the *numinosum*, that is, a dynamic agency or effect not caused by an arbitrary act of will. On the contrary, it seizes and controls the human subject, who is always rather its victim than its creator. The *numinosum* — whatever its cause may be — is an experience of the subject independent of his will. At all events, religious teaching as well as the *consensus gentium* always and everywhere explain this experience as being due to a cause external to the individual.⁵¹

Rudolf Otto, to whom Jung referred, spoke of religious experience as "creature-consciousness" or "creature-feeling":

It is the emotion of a creature, submerged and overwhelmed by its own nothingness in contrast to that which is supreme above all creatures.

[T]he 'creature-feeling' is itself a first subjective concomitant and effect of another feeling-element, which casts it like a shadow, but which in itself indubitably has immediate and primary reference to an object outside the self.⁵²

The "object outside the self," termed "the numinous" by Otto, is manifested (at least in part) as *mysterium tremendum*, characterized (in part) as the "wholly other."⁵³

Both Jung's and Otto's suggestions of an "outside object" in religious

⁴⁹ To include one's own welfare as a factor in weighing the good or bad in behavior is a most respectable ethical position. The admonition to love one's neighbor as one's self prohibits forgetting self-interest just as it prohibits giving self-preferential consideration.

⁵⁰ Some scholars are reluctant or unwilling to posit any general essence to the varied forms of religious experience. See, e.g., K. DUNLAP, *supra* note 1, at 1-10.

⁵¹ C. G. JUNG, *Psychology and Religion: West and East* in 11 THE COLLECTED WORKS OF C. G. JUNG 7 (1958).

There are, however, certain exceptions when it comes to the question of religious practice or ritual. A great many ritualistic performances are carried out for the sole purpose of producing at will the effect of the *numinosum* by means of certain devices of a magical nature, such as invocation, incantation, sacrifice, meditation and other yoga practices, self-inflicted tortures of various descriptions, and so forth. But a religious belief in an external and objective divine cause is always prior to any such performance.

Id.

⁵² R. OTTO, THE IDEA OF THE HOLY 10 (2d ed. 1950) (emphasis supplied) [hereinafter referred to as R. OTTO].

⁵³ *Id.* at 25-30.

experience are in accord with the probable origin of the Latin *religio*, namely, the verb *religare* (to hold back, to bind fast) or *ligare* (to bind). The root idea of *religio* was likely that of obligation; hence the relational motif, from the self to something else, is etymologically present.⁵⁴ This relational motif recurs in William James' definition of personal religion: "[T]he feelings, acts, and experience of individual men in their solitude, so far as they apprehend themselves to stand in relation to whatever they may consider the divine,"⁵⁵ and again in Edgar Sheffield Brightman's explication of religious experience: "Religious experience is *any* experience of any person taken in its relation to his God."⁵⁶

This suggested necessity of an external referent for religious behavior does not intend any theological or philosophical assertion. Rather, it is merely a tentative attempt to posit a phenomenological, generic description of religion. The positing of an external referent should even be able to accommodate a radically atheistic stance like that of the nineteenth century thinker, Ludwig Feuerbach. Feuerbach argued that "[r]eligion . . . [is] identical with self-consciousness — with the consciousness which man has of his nature [as a species]."⁵⁷ Thus, "the religious object is within him. . . . Such as are a man's thoughts and dispositions, such is his God"⁵⁸ Even Feuerbach's God, "the manifested inward nature [of man],"⁵⁹ could qualify as an external referent because it is subjectively understood as external:

But when religion — consciousness of God — is designated as the self-consciousness of man, this is not to be understood as affirming that the religious man is directly aware of this identity; for, on the contrary, ignorance of it is fundamental to the peculiar nature of religion.

Religion, at least the Christian, is the relation of man to himself, or more correctly to his own nature (i.e., his subjective nature); but a relation to it, viewed as a nature apart from his own.⁶⁰

⁵⁴ See WEBSTER'S NEW INTERNATIONAL DICTIONARY 2105 (2d ed. 1934); C. LEWIS AND C. SHORT, A LATIN DICTIONARY 1556 (1879).

⁵⁵ W. JAMES, THE VARIETIES OF RELIGIOUS EXPERIENCE 31 (1902) (emphasis in original). James, however, is wary of a simple abstract definition. *Id.* at 26-52. Thus he offers his definition merely "for the purpose of these lectures." *Id.* at 28.

⁵⁶ E. S. BRIGHTMAN, A PHILOSOPHY OF RELIGION 415 (1940) (emphasis in original) [hereinafter referred to as E. S. BRIGHTMAN].

⁵⁷ L. FEUERBACH, THE ESSENCE OF CHRISTIANITY 2 (2d ed. 1957) [hereinafter referred to as L. FEUERBACH].

⁵⁸ *Id.* at 12.

⁵⁹ *Id.* at 12-13.

⁶⁰ *Id.* at 13-14. Thus even Feuerbach's position would comport with Otto's claim that "[t]he numinous is thus *felt* as objective and outside the self." R. OTTO, *supra* note 52, at 11. An external referent of sorts may even be said to be objectively present in Feuerbach's description of religion. For the religious object for him is not the self *qua* individual but the self's essential nature as the human species. L. FEUERBACH, *supra* note 57, at 1-2. Interestingly, Feuerbach later (ca. 1850) somewhat receded from his "God is really man" position to a "God is really nature" view; thus the necessity for some kind of external referent became more crucial for him. See L. FEUERBACH, LECTURES ON THE ESSENCE OF RELIGION 19-22 (1967).

In view of the foregoing discussion, one might be tempted to suggest that an essential (or *the* essential) characteristic of religion is commitment to something that is subjectively understood by the believer to be other than his own self. To infer such a requirement in the *Welsh* plurality's definition of religion would be to posit (at long last) a minimal requirement of object content before a belief is to be deemed religious. Mere intensity of commitment would not be enough. The *object* of one's devotion would have to seem to the believer to be other than his own self. However, the "locus" of this required objective content may remain in the perception of the subject-believer.

Arguably then, a § 6(j) applicant whose "religiously-felt" grounds for conscientious objection are either claimed (most unlikely!) or found to be based on his own all-consuming desire for self-preservation could be denied exemption status because his "self-worship" does not meet the object content requirement of a religious belief. However, the danger of even so modest a requirement must be recognized. The danger in narrowing one's *legal* definition of religion is indirectly suggested by Brightman's criteria for a definition of religion adequate for philosophical study:

The definition of religion with which philosophy may start should, therefore, be one which notes not merely the characteristics of the definer's own religion, but rather those which are common to all persons and groups who experience what they regard as religion. This description should be purely descriptive; that is, it should be quite neutral to the normative question whether religion as it has been bears any resemblance to religion as it ought to be. A proper descriptive definition, then, is neutral to all inquiries on whether religion is true or false, helpful or harmful, illusory or veridical. It will contain solely a concept of what religion has actually been, and, like any good definition, will distinguish the *definiendum* from all other terms with which it might be confused.⁶¹

The same concern of the philosopher of religion, to posit a descriptive definition rather than his own normative one,⁶² must also be the concern of the jurist who is attempting to uphold religious nonestablishment and religious freedom. Normative definitions of what is true religion or authentic religion or healthy religion, etc., are not proper for actualizing the first amendment. The danger, then, in positing the minimal requirement that the religious object be perceived as external is that even here one may be confusing an aspect of one's own normative definition of religion with a purely descriptive one. Granted, a religion of self-worship would be

⁶¹ E. S. BRIGHTMAN, *supra* note 56, at 14-15.

⁶² At least the scholar should be able to distinguish at all times between describing religion(s) and prescribing. Religious thinkers often speak of religion in both good and bad senses. Thus, for example, "True religion [good sense] exists wherever the Unconditional is affirmed as the Unconditional, and religion [bad sense] is abolished through its presence." P. TILICH, *WHAT IS RELIGION?* 147 (1969).

regarded by most as "inauthentic," "idolatrous," "demonic," (by definition) "narcissistic," "perverse," "abnormal," "pathological" or "anti-social," but these are all essentially normative judgments. Confronting such a marginal example of religion as self-worship forces us to recognize what is at stake when one purports commitment to the idea of a religiously neutral state. Nonestablishment and religious freedom have as their ideological premise the possibly utopian idea that the state is to leave the individual utterly alone to make his own spiritual choices. In traditional language, this means that the individual is free to go to hell if that is where he insists upon going. Nonestablishment and religious freedom also mean ideally that any legal benefits or immunities enjoyed by healthy and wholesome religions also belong to loathsome and demonic religions as well. This is not to suggest that any action doing real social harm is ipso facto exempt or that it ought to be exempt from civil sanction simply because that action (or refusal to do a legally required act) is based upon religious belief. *Reynolds v. United States*⁶³ long ago made explicit that such is not the case.⁶⁴ What is being suggested is that any privilege given to religion *A plus* must also be given to religion *Z minus*. (There is admittedly very little at stake in the real world if it were legally decided that "real religion" must involve a real or apparent external referent. There is much at stake, however, if a legal definition of religion becomes significantly more normative than that.)

This entire discussion would surely convey a sense of extreme unreality to anyone involved in the incredibly difficult problem facing the fact-finder who must ascertain the sincerity and the basis of any claim for conscientious objector status.⁶⁵ If Justice Black's second group of obviously excluded registrants, whose objections to war rest "solely upon considerations of policy, pragmatism, or expediency" are understood simply to mean those religiously interested in self-preservation, that is, if the possible distinction between "real religion," as relatedness to something perceived as beyond the self, and "pseudo-religion," as self-worship, were accepted, such a category would be of precious little use to a board trying to ascertain whether a valid § 6(j) exemption existed. Would, for exam-

⁶³ 98 U. S. 145 (1878).

⁶⁴ In addition to *Reynolds*, which held that religious conviction does not protect one who practices polygamy from criminal prosecution for bigamy, see, e.g., *Prince v. Massachusetts*, 321 U.S. 158 (1944) (child labor law overrides religiously grounded activity of the selling by a minor of Jehovah Witness literature). "[T]he Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society." *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940).

⁶⁵ "The Act provides a comprehensive scheme for assisting the Appeal Board in making [the sincerity] determination, placing at their service the facilities of the Department of Justice, including the Federal Bureau of Investigation and hearing officers." *United States v. Seeger*, 380 U.S. 163, 185 (1965). The superhuman task of judging *sincerity* should not be any more difficult due to *Seeger* and *Welsh*. It is equally difficult to judge the sincerity of conscientious objection claims based upon traditional religious beliefs.

ple, the married man qualify for the exemption if the "religiously felt" source of his moral conviction not to fight were his duty to stay healthy in order to be a good husband and father? And would the single man fail to qualify because his moral conviction for self-preservation was totally self-centered and thus nonreligious? But what if he had a lover (or lovers?) to whom all else was subordinate? Would we distinguish (if we could) between one religiously and morally concerned with protecting himself for altruistic reasons ("real" religion) and one conscientiously concerned to save his own skin as, for him, the ultimate good in itself? Seemingly, practicality argues for abolishing Black's second group, however understood. If that were done, then *any* religiously-felt ground for conscientious objection to war would suffice for a § 6(j) exemption "by reason of religious training and belief."

The concern of this essay, however, is not to evaluate the practicality or impracticality of administering the various possible understandings of the scope of § 6(j) conscientious objector status. Nor is it to judge the wisdom of this or any other scheme for granting conscientious objector exemptions. Rather, the aim here is to consider what contribution *Seeger* and the four Justice plurality in *Welsh* may have made toward a constitutionally valid legal definition of religion. Admittedly, *Seeger* and the *Welsh* plurality purported only to construe a particular statutory definition. But they were construing it *so as to include all religions*⁶⁶ in order to save the statute's constitutionality.⁶⁷

III. ASSESSING THE "Seeger-Welsh" DEFINITION OF RELIGION

The definition of religion or, more precisely, of religious belief that emerges from *Seeger* and *Welsh* is marked by its sheer simplicity. A person's religion or his religious belief(s) is his commitment to whatever operates in his life with supreme importance. This "whatever" might be a single concept, ideal or value; seemingly, it could also be a composite of various goals or values, possibly in harmonious unity, possibly in tension-filled conflict. It is the what or whats for which one lives—to which one's life is functionally committed. *Anything real or imaginary* could serve as one's god(s) for this purpose.⁶⁸ Such a religion may be "other-worldly" or "this-worldly," "supernatural" or "natural," "emotional" or "rational," or any combination of these and other categories.

What follows is an assessment of this understanding of religion, uti-

⁶⁶ *United States v. Seeger*, 380 U.S. 163, 165, 175 (1965).

⁶⁷ See *id.* at 188 (Douglas, J., concurring); *Welsh v. United States*, 398 U.S. 333, 344-45 (Harlan, J., concurring in result). In *Welsh*, Justice Harlan retreated from the *Seeger* approach of construing § 6(j) to avoid any constitutional infirmity, and instead found the statutory requirement of theistic belief violative of the establishment clause.

⁶⁸ There is the possible (and probably dubious) exception of the believer's own self, subjectively perceived as his own self, discussed earlier. This "exception" was not expressly mentioned anywhere in *Seeger* or *Welsh*.

lized in *Seeger* and *Welsh*, as a possible tool of general use for the law in dealing with religion in accordance with the first amendment. Unless noted to the contrary, all references to *Welsh* will refer to Justice Black's plurality opinion. For convenience, this essay's interpretation of the view of religion that was espoused in *Seeger* and further developed by the *Welsh* plurality will be designated the "*Seeger-Welsh*" definition of religion.

A. *The Definition as a Reflection of the Current Era*

The *Seeger-Welsh* functional understanding of religion as adherence to whatever one deems of supreme importance reflects well an essential thrust of the scholarly study of religion and religions during and since the Enlightenment. In addition to the massive works of theologians "within" the various major faiths, the last two centuries or so have also witnessed an intense interest in the (more or less) objective study of religion from various extra-ecclesiastical perspectives—"psychology of religion," historical and comparative studies, "sociology of religion," anthropology, and (of more ancient origin) "philosophy of religion." Though one would not expect unanimity of religious understanding to result from these endeavors, they have undoubtedly had a universalizing effect. Encounter with the immense panoply of human religious behavior in time and space,⁶⁹ whether by the social scientist, the philosopher, or even by the apologist of a particular faith, has necessarily tended to subvert undue provincialism. The definitions of religion earlier quoted from Jung, Otto, James, and Brightman, alongside the *Seeger-Welsh* definition itself, well reflect this thrust toward a description of religion hopefully able to accommodate all shapes and sizes.

A particularly crucial and sensitive aspect of this "universalizing effect" involves the concept of deity, a matter that cannot easily be separated from the problem of defining religion. The issue in *Seeger* was, in part, exactly as the Court stated:

⁶⁹ How many religions has mankind produced? If we say that one religion, as an entity, is distinct from another when its pantheon, its ritual, its ethical commitments, and its mythology are sufficiently different for its adherents to consider that the adherents of other religions are, in a general sense, "unorthodox" or "pagans" or "non-believers," then we must conclude that mankind has produced on the order of 100,000 different religions. This figure is based on several assumptions: first, that religion began with the Neanderthals, who about 100,000 years ago were carefully burying their dead with grave goods and building small altars of bear bones in caves; second, that there have been at all times since the Neanderthals a thousand or more culturally distinct human communities, each with its own religion; and third, that in any cultural tradition, religions change into ethnographically distinct entities at least every thousand years. Religion is a universal aspect of human culture. Furthermore, for every religion which has survived and been routinized, either as a small community faith or a "great religion" such as Christianity or Islam, there are dozens of abortive efforts by untimely prophets, victims of paranoid mental disorders, or cranks which are ignored or suppressed by the community.

A. WALLACE, RELIGION: AN ANTHROPOLOGICAL VIEW 3-4 (1966).

Does the term "Supreme Being" as used in § 6(j) mean the orthodox God or the broader concept of a power or being, or a faith, "to which all else is subordinate or upon which all else is ultimately dependent"?⁷⁰

In opting for the latter and "broader" concept, it is inconceivable that the *Seeger* Court was not affected by the theological-philosophical climate of the modern era.⁷¹ If Will Herberg's hints at a de facto Protestant-Catholic-Jewish "establishment" in America⁷² were by 1965 anything more than ancient history, then the Court was doing more than broadening the term "Supreme Being" to accommodate the numerically small, traditionally non-theistic religions in America. It was also utilizing an understanding of deity broad enough to include the contemporary liberal wings of the three traditional mainline religious faiths that have dominated the American scene.⁷³ For one cannot adequately explain the difference in describing religion in *Seeger* and *Welsh* from that of *Davis v. Beason*⁷⁴ without noting the impact that Enlightenment and post-Enlightenment theological development has been having at the "grass roots" level of American religion over the past few decades.⁷⁵ The impact of this development has been experienced by the "liberal side" of all three major faiths, Protestant,⁷⁶ Catholic, and Jewish, though generally sooner and more pronouncedly in Judaism⁷⁷ and generally later and, so far, least pronouncedly in Roman Catholicism. What has occurred is a basic reunderstanding both of Deity and of cosmology on the part of many adherents within

⁷⁰ *United States v. Seeger*, 380 U.S. 163, 174 (1965), quoting from WEBSTER'S NEW INTERNATIONAL DICTIONARY 2536 (2d ed. 1934).

⁷¹ The *Seeger* Court's own recognition of this is most candid. "Moreover we believe [our] construction embraces the ever-broadening understanding of the modern religious community." 380 U.S. at 180.

⁷² See W. HERBERG, PROTESTANT—CATHOLIC—JEW 27-41, 56-57, 211, 242-46, 256-59 (rev. ed. 1960) [hereinafter referred to as W. HERBERG]. Herberg sees all three of these religions paying a high price for their sociologically established position; namely, their historical-theological groundings are de-emphasized as each becomes a spiritual mouthpiece for what he calls our common (and often quite intolerant) secular American religion, the American way of life. *Id.* at 72-90.

⁷³ It is therefore not surprising that of the four religious authorities quoted in the *Seeger* Court's opinion to lend support in some way to its definition of "Supreme Being," two were Protestant theologians and one was a Roman Catholic declaration. 380 U.S. at 180-83.

⁷⁴ 133 U.S. 333 (1890). There the court stated that "[t]he term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will." *Id.* at 342.

⁷⁵ See generally R. STARK & C. GLOCK, AMERICAN PIETY: THE NATURE OF RELIGIOUS COMMITMENT (1968) [hereinafter referred to as R. STARK & C. GLOCK]. The survey data on which this volume's analysis rests was gathered in 1963-64.

⁷⁶ However, within the many and diverse separate denominations customarily lumped into the one composite term "Protestant," the timetable and effect has varied widely. Also a particular sect may polarize on the matter of "traditional" versus "modern" views on God and cosmology. Such polarity, along with a cleavage as to proper ecclesiastical, political and social stances, seems to have underlain the dispute in *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Church*, 393 U.S. 440, 442 n.1 (1969).

⁷⁷ See W. HERBERG, *supra* note 72, 196-97, 208n. 65.

each of these three Biblical faiths.⁷⁸ For a portion of the members of the three "quasi-established" religions in America, a view of "Supreme Being" and of religion as broad as that encompassed in *Seeger* would be necessary.⁷⁹

The above discussion suggests that, despite the constitutional ideal of absolute neutrality regarding every conceivable variety of religious adherence, unorthodox views are most likely to receive constitutional protection when they become not quite so unusual. (It would be most unsurprising if this generalization could be extended to all forms of deviant behavior ideally entitled to constitutional protection.) In other words, our ability to delineate the scope of religion encompassed by the first amendment is bound to be somewhat colored by the time and place from which we attempt to perceive reality. The *Seeger-Welsh* definition of religious belief, as with any likely alternative definition, is thus very much a creature of its own time. Realizing that this is so compels us to regard this definition or any other definition of religion as utterly tentative. That the definition reflects much contemporary thinking is not, however, reason to preclude its being considered on its merits. To insist that legal norms, including constitutional norms, not reflect the historical situation is to insist upon the impossible (and possibly the undesirable as well). Even so, one must be particularly aware that the *Seeger-Welsh* definition reflects the thought processes of Western culture and, therefore, runs the risk of failing to fully accommodate the vast spectrum of Oriental, African, and other religious traditions. Even this should be viewed only as a possible danger, not as a foregone conclusion. For how truly universal the *Seeger-Welsh* definition might prove itself to be, if it were generally employed to interpret the first amendment religion clauses, would in great part depend on how varied were the persons and groups who put it to the test.⁸⁰

B. *The Definition's Delineative Effect*

Regardless of its special relevance to much contemporary philosophical and theological thinking, the *Seeger-Welsh* formula appears to fulfill Brightman's criterion⁸¹ that a definition of religion should be descriptive (and hence, hopefully, universal) rather than normative. The orthodox theist may readily suggest that the *Seeger-Welsh* view of religion re-

⁷⁸ See, e.g., J. ROBINSON, *HONEST TO GOD* (1963); R. BULTMAN, *et al*, *KERYGMA AND MYTH* (1961). For post-*Seeger*-pre-*Welsh* insights (of a wide variety of sorts) into the contemporary religious scene, see generally 1968 & 1969 *THE RELIGIOUS SITUATION* (D. Cutler ed. 2 vols. 1970).

⁷⁹ See R. STARK & C. GLOCK, *supra* note 75, at 25-32, and 204-11 in connection with Christianity.

⁸⁰ *Quaere* as to what modifications in such an attempted "universal" understanding of religion might be required by our encounter with intelligent fellow creatures from other planets.

⁸¹ See quotation in text accompanying note 61 *supra*.

flects the contemporary secularism and "theological modernism" that staunch orthodoxy would tend to deplore. But such a criticism could only purport to fault the *Seeger-Welsh* definition's broad inclusiveness: no serious religionist appears to have been *excluded* by the definition; the only change vis-à-vis a more theistic understanding of religion is the inclusion of additional people who purport to be serious even if they do not necessarily purport to be, by conventional label, religious. It may well be an indication of the required neutrality in a constitutionally valid definition of religion that the locus of description be broad enough to arouse the objection of undue broadness by some (or most?) of the included groups! The more likely basis of attack on the alleged neutrality of the *Seeger-Welsh* definition would of course focus on what it classifies as *non-religious*, for the definition does not label all human behavior or even all human belief as religious, a point to be dealt with in the discussion that follows.

Two possible interpretations were previously offered concerning the refinement of the *Seeger* definition by Justice Black's *Welsh* plurality opinion. The first of these interpretations⁸² excluded from the category of religious beliefs: (1) beliefs not deeply held; and (2) beliefs that are solely "considerations of policy, pragmatism, or expediency,"⁸³ with the latter exclusion understood to involve *only* the circumstance of a "believer" primarily concerned with his own personal welfare. This understanding of "considerations of policy, pragmatism, or expediency" may be deemed by the reader as either a clarification or a modifying refinement of Justice Black's opinion in *Welsh*. Whichever it is, no *broader* scope of this second exclusion can be allowed without: (1) directly contradicting both the holding of the case and the remainder of the opinion, which refused to allow the political-sociological-philosophical-moral code clause in § 6(j) to restrict the category of religiously grounded conscientious objectors;⁸⁴ and (2) doing violence to the central motif in *United States v. Seeger*⁸⁵ and in the *Welsh* plurality opinion itself, which was to avoid picking and choosing between different forms of religious-ethical thinking.⁸⁶ If this interpretation of the *Welsh* plurality opinion is valid, then the only beliefs excluded from the category of "religious beliefs" are: (1) those that are not deeply held; and (2) those that relate only to the self as one's supreme commitment. It was earlier suggested that even this reading of Justice Black's second exclusion has the effect of adding a normative restriction to the *Welsh* definition of religion.⁸⁷ Therefore, a

⁸² See text accompanying notes 44-49 *supra*.

⁸³ *Welsh v. United States*, 398 U.S. 333, 343 (1970).

⁸⁴ See *id.* at 343; see also text accompanying notes 38-43 *supra*.

⁸⁵ See 380 U.S. at 165, 175, *cited with approval*, 398 U.S. at 338.

⁸⁶ See text accompanying notes 44-46 *supra*.

⁸⁷ See text accompanying notes 61-64 *supra*.

second interpretation of the *Welsh* plurality opinion was advocated: abolish Justice Black's second category of excluded persons *in toto*. Religious belief is then limited to commitment to *whatever* one considers of supreme importance in life — period. This second interpretation deletes explicit language from Justice Black's opinion in *Welsh*, but it does so only to carry out fully the broad, neutral approach to defining religion that was correctly espoused by the *Seeger* Court and the *Welsh* plurality. It is this second interpretation of the Black opinion, then, that should be understood as the "*Seeger-Welsh*" definition of religious belief. Such will be the understanding here, albeit nowhere else.

The *Seeger-Welsh* definition, even according to the broad interpretation just advocated, excludes from the category of "religious beliefs" all beliefs that do not function in the person's life analogously to that of "the God of those admittedly qualifying for the [conscientious objector] exemption,"⁸⁸ that is, beliefs that do not function as God⁸⁹ functions in the life of the orthodox theist who bases his conscientious objection to war on his understanding of (and his need to obey) divine will. In other words, the definition excludes beliefs which are not "based upon a power or being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent,"⁹⁰ thus excluding from the category of the "religious" all beliefs that are not based upon what one deems controlling in his life. This exclusion raises at least four major grounds for criticism, now to be discussed.

1. A Normative Component?

The first such ground is this: By restricting religious beliefs to those beliefs based on whatever one deems of ultimate concern, one is, after all, introducing a normative factor. Must religious belief involve a totality of commitment on the part of the believer? What of the half-hearted or lukewarm or simply playful religious experiences? Shouldn't such "easy-going" religion be included in a descriptive (and supposedly universal) definition, even if deemed excludable from a normative standpoint? Some might consider the following formulation by Vergilus Ferm an improvement over *Seeger-Welsh*:

*To be religious is to effect in some way and in some measure a vital adjustment (however tentative and incomplete) to w(W)hatever is reacted to or regarded implicitly or explicitly as worthy of serious and ulterior concern.*⁹¹

⁸⁸ 380 U.S. at 176.

⁸⁹ Or "belief in God," if one prefers. *Seeger* states the matter both ways; see note 19 *supra*.

⁹⁰ 380 U.S. at 176.

⁹¹ V. FERM, FIRST CHAPTERS IN RELIGIOUS PHILOSOPHY 61 (1937) (emphasis in original).

Though Ferm clearly makes allowance for the fickleness of human commitment with his parenthetical "however tentative and incomplete," he still requires "a vital adjustment" to something subjectively deemed "worthy of serious and ultimate concern." Thus, while conveying an awareness of the frequent ambiguity of human commitments ("religious" or other), Ferm's definition also conveys the idea that religion *qua* religion (whether good or bad) is a matter of importance to the participant. As the other definitions of religion previously quoted suggest, the idea that religion involves real personal commitment is widely shared by those who have endeavored to study the subject from various scholarly perspectives.

This requirement of deep commitment also has validity from the standpoint of common sense. The often heard demand for "authenticity," "credibility," and "sincerity" suggests that one's religious beliefs are not so much what one says he believes (or even thinks he believes), but rather *what one does with his life at all significant points of decision*. The values one actually serves point to the nature of one's God or Gods.

A reasonable awareness of human frailty, and thus a reading of the *Seeger-Welsh* definition that understands it to encompass something less than "perfect" human religious commitment, is as far as one should go in broadening further an already broad definition. Hopefully, we are moving toward a constitutional definition of religion capable of describing what is functionally included in religious nonestablishment and, of particular relevance to the point now under discussion, what is functionally included in religious freedom per the first amendment. If we are positing a legally and constitutionally significant dimension of human experience that might function effectively as a shield against unwarranted governmental interference, it is not too much to ask that the dimension itself have more than superficial value to the persons asking for its protection. Thus, the readily justifiable requirement that one who purports to be a religiously grounded conscientious objector to military service be sincerely committed to deeply felt beliefs is apt to have validity in other areas of first amendment religious protection.

This last statement does *not* mean that religious freedom would (or should) receive less protection than it presently enjoys were the *Seeger-Welsh* requirement of deep commitment generally employed by the courts as a constitutional definition of religion. For in the protection of religious freedom, there still would be no need to differentiate between "religious" and "nonreligious" within the sphere of religious behavior that is also protected by first amendment and due process "freedom of expression" guarantees, which are not specifically religious in character. In other words, since freedom of belief, speech, press, assembly, etc., are protected whether or not religious, they would certainly remain protected whether or not the beliefs, speech, etc., were deeply felt or, for that matter, were "felt" at all.

Rather, the only spheres in which the *Seeger-Welsh* definition could have any delineative effect between religion and nonreligion are: (1) free exercise protection going beyond belief, speech, etc.; and (2) possibly some establishment clause concerns. Even in these spheres, it would not follow that "profound commitment" would always be relevant to the decision in question. The legal adjudicator would probably not be concerned with ascertaining an individual's or religious group's intensity or depth of commitment in either of the following two instances.

a. When the secular interests in conflict with the religious claim are slight.

In a situation in which little is at stake with respect to the state's or one or more other individual's or group's interests of health, safety, economic need, etc., the decisionmaker (whether legislature, court, administrator, or whatever) might well find it more sensible to treat the religiously based claim as sincerely and deeply felt without attempting to substantiate evidentially the religious claimant's intensity of subjective commitment.⁹² Religiously grounded objection to serving on a jury or working on a religious holiday might be examples of when, simply as a matter of resource allocation, it would seem foolish to engage in the difficult and problematic task of assessing sincerity or subjective fervor. Particularly when the number of likely claimants arguing a religiously based interest is expected to be small, a presumption of sufficient commitment makes practical sense.

On the other hand, if a religiously grounded right is apt to be asserted with significant frequency and the secular interests at stake are substantial, an inquiry into depth of commitment is warranted. In certain situations, even when the number of religiously grounded claims is proportionately small, a valid (and politically felt) demand for fairness might require factual inquiry into the sincerity and strength of religious commitment. Purported fairness to those *not* making the religiously based claim would require factual ascertainment that those whose religious scruples were honored were intensely opposed to the required legal norm. Conscientious objection to compulsory combatant military service would seem to be an obvious example of when society is unwilling to tolerate the granting of exemptions without some inquiry into each claimant's subjective commitment.

This discussion may also imply that the quantum of subjective religious commitment required for a "beyond mere speech" free exercise claim

⁹² The possibility exists that two or more competing parties could each advance "a religious ground" for their position in a given dispute. The adjudicator would then have to decide whether to treat these religious claims as *bona fide*, without taking proof of subjective commitment, or to attempt to assess the sincerity and/or intensity of each. (*Quaere*, if the first approach is taken, should he allow refutation of subjective adherence by proof of inconsistent speech or conduct and then allow the claimant to rebut the evidence of inconsistency?) It is quite likely that the decisionmaker's assessment of the "objective" importance of accompanying secular interests relevant to the decision would decide which course should be taken (as well as carrying much weight in determining the decisional outcome itself).

should vary in direct proportion to the societal value of the competing secular interests involved.⁹³ This, of course, does not mean that overwhelming religious conviction should justify heinous criminality. Rather, it merely suggests that when competing secular interests are noncrucial enough to allow for their possible deference to religious scruples, it would be proper to require more fervent religious conviction as the importance of the competing secular interests increases. Conversely it would be quite proper to presume a sufficient commitment when a person claims religious conviction⁹⁴ and the social cost of honoring his claim would be slight.

It might also be that, in terms of the competing secular interests, the social cost of recognizing the religious claim would *not* be great enough to lead us to require any minimal amount of "intensity" or "depth" of commitment, but the cost *would* be enough to have us require a fact-finding of mere "sincerity." This suggests that "intensity" or "depth" ("strength") of commitment is distinguishable from "sincerity" in some real way. (For example, *A* could sincerely be opposed to serving on a jury and "judging others" for "religious" and/or "ethical" reasons; however, *A*'s opposition could be of minor concern to *A*.) Recognition of the distinction could be given practical application by, for instance, requiring affirmative evidence when "intensity" or "depth" was required, but placing the burden on the party or parties contesting the religiously grounded interest to show evidence of insincerity if "mere sincerity" were deemed sufficient to establish the bona fide status of the religious scruple in question.

The instant discussion would tend to apply, *mutatis mutandis*, to areas more cognizable under the establishment clause. Consider the granting of tax exemptions to religious organizations. In the context of a legislatively enacted, broad scope of categories of nonprofit organizations qualifying for a certain tax exemption,⁹⁵ it might well make sense not to test the commitment of any group seeking exemption as a self-designated religious body. Other religiously neutral criteria (nonprofit operation, nonuse of the exempted property primarily for a residence, etc.) could serve as well or better to exclude legally undeserving applicants for tax exemption. And these criteria do not involve government in the incredibly difficult

⁹³ Concerning the immense difficulties both of positing religiously neutral criteria for "measuring" subjective commitment and of making a factual determination in any given instance according to the criteria posited, see text accompanying notes 123-25 *infra*.

⁹⁴ Any functional equivalent to the explicit term "religious" must of course suffice if the claimant prefers not to designate himself as being religious. Cf. *Welsh v. United States*, 398 U.S. 333, 339-42 (1970).

⁹⁵ For example, according to the Court in *Walz v. Tax Comm'n*, 397 U.S. 664 (1970), New York's property tax exemption is granted "to all houses of religious worship within a broad class of property owned by nonprofit, quasi-public corporations which include hospitals, libraries, playgrounds, scientific, professional, historical and patriotic groups." *Id.* at 673. Cf. N.Y. REAL PROPERTY TAX LAW §§ 420-86-A (McKinney Supp. 1971-72), formerly §§ 420-86 (McKinney Supp. 1969-70), the latter being in effect when *Walz* was decided.

and dangerous (to religious liberty) project of determining which groups purporting to be religious are hypocrites and which groups are sincere, much less which groups are "deeply committed." Yet, the potential political turmoil notwithstanding, a political entity is not constitutionally barred from announcing that henceforth its tax favors for religious groups would be denied those groups whose overt behavior, empirically verifiable, was, as to secularly cognizable matters,⁹⁶ substantially contrary to its religious teaching. For example, X church preaches the obligation to share wealth with the destitute, but its membership fails to do so in any significant way. To deny a tax exemption to X church along with all other religious groups who also fail to conform their secularly cognizable conduct to their explicitly pronounced secular preachments would, in principle, be little different from denying § 6(j) conscientious objector status to a registrant who is shown to have advocated the killing of defenseless people. (This theoretical point is made with full knowledge that government has enough evils to combat without engaging in a campaign against secular hypocrisy in religious institutions.)

When no readily ascertainable, secularly cognizable behavior is involved, the constitutionality of deciding the existence of some stated requirement of subjective commitment would be much more problematic. X religion's teachings might not cover any secularly cognizable matters or, if they did, they might be too abstract for empirical assessment. In such cases, it is virtually impossible to assess subjective commitment in a religiously neutral way. This difficulty is not apt to arise in the free exercise area, where any question of commitment, such as "How deeply is A opposed to *participation in war*?" or, "Is B sincere about being conscientiously opposed to *serving as a juror*?", would be tied to secularly cognizable, concrete behavior. (And, if the free exercise activity in question did not go beyond protected free speech, etc., no showing of sincerity or commitment would be required at all.) The difficulty is, therefore, peculiar to a matter involving the establishment clause when sincerity or depth of commitment is sought to be made a requisite for any purportedly religious group's enjoyment of a constitutionally permissible, civil benefit (such as a tax exemption), but when there is no secularly cognizable referent for assessing the subjective commitment. In this category of establishment clause problems, the *Seeger-Welsh* emphasis on bona fide subjective commitment would not be a workable tool; instead, government would, as suggested earlier, have to use other religiously neutral criteria (bona fide nonprofit status, etc.) or else award the benefit to self-designated religious groups simply because they have applied. (Very little

⁹⁶ "Secularly cognizable matters" refer to those aspects of human behavior and experience properly cognizable even by a religiously neutral state (physical health, safety, economic necessities, etc.). A common accord as to what the outer limits of this sphere should be is, of course, highly unlikely.

governmental largess is apt to be issued on the latter basis.) This exception to the perfect universal applicability of the *Seeger-Welsh* definition does not necessarily mean that it would have no value in the establishment of religion area.⁹⁷ It is important also to note that this exception to the *Seeger-Welsh* definition's appropriateness must apply with equal force to any other definition of religion. Since the exception only applies to religious behavior without any secularly cognizable referent, a religiously neutral definition of religion with any delineative effect is inherently impossible in such cases.

b. When the self-designation of the party's stance (as religious or non-religious) and his other speech and conduct with respect to issues other than his own subjective commitment tend to determine the outcome.

This second category of instances in which factual ascertainment of subjective commitment is not needed might include, for example, one who consistently purported to be a "purely religious" faith healer,⁹⁸ making no claims of medical or scientific expertise, and confining his treatment to non-physiological methods; he normally ought to be exempt from a medical licensing requirement.⁹⁹ However, one who either designated himself as having medical or scientific expertise or who intervened in the body's

⁹⁷ See text accompanying notes 268-80 *infra*. There is one obvious instance of "special inapplicability" of any requirement of subjective commitment in the nonestablishment area. It would hardly do to argue that otherwise constitutionally impermissible state aid to religion would be made permissible were the entity receiving the aid insincere or lukewarm as to its alleged religious commitment. Forbidden aid to religion must cover hypocritical or pseudo religion as well as devout religion, with a complete lack of discrimination.

⁹⁸ Obviously, the ascertainment of the party's assertions about his stance's being religious or not would not necessarily be confined to noting the position he takes before the decisionmaker; *i.e.*, a factual hearing as to his past self-characterizations in relevant situations would be appropriate.

⁹⁹ See *People v. Cole*, 219 N.Y. 98, 113 N.E. 790 (1916). This does not necessarily mean that the religious healer's purportedly religious stance could not be subject to attack as made in bad faith, *e.g.*, by proof that it was purely a sham to disguise a commercial enterprise. See also *Founding Church of Scientology v. United States*, 409 F.2d 1146, 1162 (D.C. Cir.), *cert. denied*, 396 U.S. 963 (1969). And the religious grounding of a faith healer's claims need not insulate him from criminal liability for particular acts of overt criminal behavior, including fraud. *United States v. Ballard*, 322 U.S. 78 (1944), did not hold that a representation subject to reasonably certain empirical disproof would be immune from liability for criminal fraud simply because it was alleged to have religious meaning to the declarant. (Examples: (1) *A* tells *B* that for \$1000 he can unconditionally guarantee that *B* will live to age 90. *B* pays *A* the money and dies of natural causes at age 50. *A* was aware of previous instances in which his "longevity guarantees" had failed: (2) *A* tells *B* that for \$1000 he can guarantee a cure for *B*'s cancer with absolute assurance. *B* pays *A* for the treatment, which fails. *B* dies of the cancer. *A* was aware of having had other cancer patients who had not been cured by the same spiritual treatment.) The Court in *Ballard* only held that the truth or falsity of religious doctrines or beliefs should not be submitted to the factfinder in a criminal prosecution for fraud. *Id.* at 86-88. The Court's refusal to reverse *Ballard*'s criminal conviction, contrary to dissenting Justice Jackson's inclination, *id.* at 92-95, does suggest that when, as in the above two examples, a jury could reasonably find that, beyond a reasonable doubt, the declarant himself did not believe his own statement, a conviction for fraud may be constitutionally possible. However, the Supreme Court has never ruled on this question. (Obviously the reasonableness of the jury's certainty that the declarant's religious representation was subjectively fraudulent is very much dependent on its ready empirical disproof.)

physiology (such as by prescribing drugs) ought not be exempt from the requirements of otherwise constitutional state regulation of medical practice; this would be so whether or not the practitioner had *also* characterized himself as a "religious" healer, for his other self-characterizations and/or his actual method of treatment arguably bring him within the ambit of secular concern too crucial for religious exemptions.¹⁰⁰

Despite these instances in which sincerity or strength of subjective commitment would probably not be employed to differentiate religion from nonreligion, the positive value of the *Seeger-Welsh* definition's delineative effect still stands as a general principle. The subjective commitment requirement would have maximal usefulness in the most crucial group of "church and state" decisionmaking situations, namely, whenever free exercise of religion protection was claimed for an overt act (or refusal to act), if such behavior were in conflict with one or more substantial, secular interests. In these instances both practical political reality and wise policy making require that the religious scruples in question be felt strongly enough to justify the decisionmaker's consideration of them as a factor in his decision. Thus, Brightman's second criterion for an initial philosophical definition of religion also has significance for the jurist. The definition, says Brightman, "like any good definition, will distinguish the *definiendum* from all other terms with which it might be confused."¹⁰¹ The *Seeger-Welsh* definition of religion, as here interpreted, has quite properly refused to exclude any belief on the basis of its object content or the grounds of the belief.¹⁰² This is absolutely essential if first amendment religious protection is to acquire its intended meaning. The state cannot legally "pick and choose" what it shall deem to be religion according to the content, values, goals or rationales of people's commitments. However, the requirements of the first amendment religion clauses do not preclude a rational, theologically neutral delineation between what *is* religion and what *is not*. Indeed, in a practical sense these clauses require it,¹⁰³ lest by allowing religion to include everything, it comes to have little or no constitutional significance. Such a constitutionally unintended and undesirable result would be most probable; it is most likely that legislatures and judges alike would be reluctant to take cognizance of religiously based

¹⁰⁰ See *People v. Vogelgesang*, 221 N.Y. 290, 116 N.E. 977 (1917).

¹⁰¹ E. S. BRIGHTMAN, *supra* note 56, at 15.

¹⁰² Thus, the beliefs may be political, sociological, philosophical, moral or *anything else*, provided they are deeply held.

¹⁰³ The analogy to the treatment of other first amendment concerns is clear. For example, free speech requires that government not condition its protection of speech on the basis of what is said (with certain ever perplexing exceptions, such as defamation, fraud and clear and present danger of real injury). However, it is impossible for courts to protect freedom of speech without delineating *what speech is*. See, e.g., *Schacht v. United States*, 398 U.S. 58 (1970); *Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969). See also *NAACP v. Burton*, 371 U.S. 415 (1963) with respect to protecting the general first amendment right to peaceable political association and expression.

scruples, were the mere assertion of any such claim always enough to qualify it as religious. The tolerant subjectivism in the following statement has its appeal:

Because religion can be in conflict with other disciplines, because it cuts across everyday life, we can only know that a claim is based on religion when we are told that it is. The legal basis for stating that a claim is in the religious domain can be that it is held out as being religious in nature.¹⁰⁴

Despite its libertarian intent, the literal adoption of such a nondefinition of religion would have anything but a libertarian effect. Responsible (and politically sensitive) decisionmakers, both legislative and judicial, are not going to balance a religiously grounded interest against any but the most trivial secular interest simply because the religious claimant tells us his stance is a religious one, or because he "holds out" his behavior as being religious in nature. However, by requiring some kind of showing of sincerity or deep commitment, a constitutionally valid basis exists for distinguishing in a given legislative, judicial or administrative decision *what in human experience is to be deemed legally religion* (and thus, if relevant to the decision, worthy of recognition *qua* religion as a factor in that decision) *and what, because it lacks the requisite sincerity or commitment, need not be legally recognized as religion for purposes of that decision*. (It may sound more neutral to ask, "How much religion is required for legal recognition?" rather than asking, "What *is* religion for purposes of legal recognition?" However, with the same subjective commitment test being used to answer either question, the outcome would always be identical.)

Probably no more significant testimonial to the genuine neutrality of the *Seeger-Welsh* definition's delineative effect is available than that of Justice Harlan's concurring opinion in *Welsh*.¹⁰⁵ Harlan's credentials for strenuously opposing legal favoritism for certain religions over others and for religion over nonreligion¹⁰⁶ are well established.¹⁰⁷ The position he took in the *Welsh* case is therefore of no small interest. As noted earlier, he refused to go along with the *Welsh* plurality's decision to continue the *Seeger* course of "rewriting" § 6(j)'s definition of religious belief in order to save its constitutionality.¹⁰⁸ In *Welsh*, Justice Harlan not only found §

¹⁰⁴ Weiss, *Privilege, Posture and Protection: "Religion" in the Law*, 73 YALE L.J. 593, 604 (1964). This quotation does not fully reflect the position Weiss takes in this article, but it is discussed in the text accompanying notes 163-65, 228-35 *infra*.

¹⁰⁵ 398 U.S. at 344-67.

¹⁰⁶ The matter of favoritism for religion over "nonreligion" is treated in text accompanying notes 177-89 and 259-67 *infra*.

¹⁰⁷ See, e.g., Justice Harlan's dissent in *Sherbert v. Verner*, 374 U.S. 398, 418-23 (1963) (Harlan, J., dissenting).

¹⁰⁸ In so doing, Justice Harlan explicitly receded from his stance in *Seeger*, where he had joined in the construing-to-preserve-constitutionality approach. 398 U.S. at 344-45.

6(j)), as written, to describe an impermissible distinction in favor of theistic over nontheistic religions; he also deemed unconstitutional its granting of conscientious objector status only to religiously grounded opposition to war, thus, according to his terminology, favoring religion over nonreligion.¹⁰⁹

Despite his explicit rejection (on establishment of religion grounds) of the granting of conscientious objector status only to those objecting to war for religious reasons, Justice Harlan fully acceded to the *operative effect* of the *Welsh* plurality's reconstructed § 6(j) definition of religion. His full approval of the definition's operative effect means that Justice Harlan was in agreement with the plurality's delineation of which registrants would legally be entitled to § 6(j) exemptions and which registrants would not. He wrote:

Thus I am prepared to accept the prevailing opinion's conscientious objector test, not as a reflection of congressional statutory intent but as patchwork of judicial making *that cures the defect of underinclusion* in § 6(j) and can be administered by local boards in the usual course of business.¹¹⁰

He of course insisted that the § 6(j) exclusion from conscientious objector status of individuals "whose [deeply felt] beliefs emanate from a purely moral, ethical, or philosophical source" must be denied effect.¹¹¹ (The *Welsh* plurality opinion did just that.¹¹²) Therefore, except for disapproving of the tactic of reconstructing § 6(j) rather than admitting it was unconstitutional as written, Justice Harlan's only disagreement with the *Welsh* plurality opinion was that it called "religion" (or described as "function[ing] as a religion in [one's] life"¹¹³) what Justice Harlan called "conscience" or "personal ethical considerations."¹¹⁴

Deciding which of the above choice of words is preferable is not the purpose of the present discussion. Rather, Justice Harlan's concurring opinion in *Welsh* is considered here to show that the *delineative effect* of the *Welsh* plurality's definition of religion (or whatever term the reader prefers) was neutral enough to satisfy even the strict religious neutrality required by Justice Harlan. Because the *Seeger-Welsh* functional definition of religion does not exclude any human concern on the basis of object content, but instead excludes from religion when lack of subjective commitment to the chosen object is demonstrated, *real neutrality is preserved without rendering the definition meaningless.*

¹⁰⁹ *Id.* at 357-58.

¹¹⁰ *Id.* at 366-67 (emphasis supplied).

¹¹¹ *Id.* at 358.

¹¹² See text accompanying notes 38-43 *supra*.

¹¹³ 398 U.S. at 340.

¹¹⁴ See *id.* at 358-59 nn. 9 & 10. Thus, Justice Harlan deemed "the common denominator" of those qualifying for § 6(j) exemption after *Welsh* to be "the intensity of moral conviction with which a belief is held." *Id.* at 358.

2. A Hidden Monotheism?

The second ground for criticizing the exclusionary aspect of the *Seeger-Welsh* definition is a most perplexing one. In Justice Black's opinion in *Welsh*, "deeply held" beliefs,¹¹⁵ "deeply and sincerely" held beliefs,¹¹⁶ and "beliefs held with the *strength* of traditional religious convictions,"¹¹⁷ when they imposed a duty of conscience, were, *as regarded the believer's subjective commitment to his beliefs*, equated with the *Seeger* concept of beliefs occupying a place analogous to orthodox belief in God, that is (per *Seeger*), beliefs based upon a faith to which all else is subordinate. This equation was at work throughout Justice Black's *Welsh* opinion, and at one point he expressly stated:

If an individual deeply and sincerely holds beliefs that are purely ethical or moral in source and content but that nevertheless impose upon him a duty of conscience to refrain from participating in any war at any time, those beliefs certainly occupy in the life of that individual "a place parallel to that filled by . . . God" in traditionally religious persons.¹¹⁸

So far in this essay, the *Welsh* plurality's equation of depth or intensity of belief that imposes a duty of conscience with belief-in-God-like commitment, has been uncritically accepted and utilized. But now the "Disturbing Question" must be faced: *Is it the same thing (a) to require that conscientious beliefs must be deeply or strongly felt in order to be religious and (b) to require that beliefs must be based on a faith to which all else is subordinate, analogous to a deeply felt orthodox belief in God, in order to be religious?* (The problem is not so much that there is no end to the number of meanings that could be given, and are given, to "orthodox belief in God." *Seeger* made it clear enough that all that is required is supremacy over other commitments in the believer's life.¹¹⁹ Nor is the problem that of "lukewarm belief" in a supreme being, traditional or otherwise; for even the most orthodox belief would have to satisfy the requirement of real subjective commitment when and to the extent such a requirement was appropriate to the particular decision in question. Nor is the problem that of a person's having a *weak conscientious scruple* as to the particular behavior legally required or forbidden, with the scruple *grounded in a strong faith*, for example, deep belief in God as the ground for a "mild opposition" to war. If strong, deeply felt commitment regarding the particular behavior were lacking in the individual, *but were required for the religiously based legal exemption*,¹²⁰ strong belief in whatever the weak

¹¹⁵ *Id.* at 342.

¹¹⁶ *Id.* at 340.

¹¹⁷ *Id.* (emphasis supplied).

¹¹⁸ *Id.*

¹¹⁹ 380 U.S. at 176.

¹²⁰ Such a requirement does exist with respect to § 6(j) exemptions from combatant service, as most anyone who has ever attempted to claim conscientious objector status will readily attest.

scruple was "grounded" upon would be immaterial; the individual would therefore fail to qualify for that religious exemption.) The problem raised in the question stated above is this: If we legally define religion as requiring commitment to something to which the believer deems all else subordinate, are we not, after all, smuggling in some quasi-theological content in the sense that by requiring one controlling faith, we are requiring a kind of "functional monotheism." Why not drop the *Seeger* "to which all else is subordinate" requirement and simply use the *Welsh* plurality's "deeply-felt-beliefs-imposing-a-duty-of-conscience" test, understanding that the individual may well serve a host of competing "deities"? If we don't go that far, wouldn't the "delineative effect" of *Seeger-Welsh* serve mainly to exclude functionally "polytheistic" religions? These questions suggest both the obvious conclusion that parts (a) and (b) of the earlier posited "Disturbing Question" do not constitute precisely the same test and the less obvious conclusion that only requirement (a) is genuinely theological-ly neutral.

The second conclusion is less obvious for this reason: The "functional monotheism" suggested by the *Seeger* "to-which-all-else-is-subordinate test" need not be taken in a theological sense. In other words, no matter how many "gods" one may serve, "one" is still himself, an individual. There is a limit to the number of objects to which he can be deeply and intensely ("religiously") attached. Though this number may be more than one, the believer is still one. His life may be torn between or among conflicting commitments; to some extent we all are. The fracturing of one's personality by such conflicts may, of course, reach such proportions as to be a matter of psychiatric concern. However, most persons are able to integrate somewhat their conflicting commitments. "Functional Polytheism," then, often includes an overriding synthesis; not in the sense of the individual's negating all conflict, but in the sense of his constructing a *modus vivendi*.

Consequently, in practice there should be much less difference between requirement (a) (deeply felt conscientious beliefs) and requirement (b) (all else subordinate) than might at first appear. Since humans have a finite amount of energy,¹²¹ there are limits as to how many things one can feel intensely. More importantly, the *Seeger* "all else subordinate" test does not require that the particular belief in question (such as objection to participating in war) should be supreme to all else. What it does require is that the power or being or faith or (*Welsh*) ethical stance upon which the objection is based be of supreme importance. Even a "polytheistic" synthesis of varying commitments could so function.

In the case of an exemption to required or prohibited conduct, claimed on the basis of religion, if the relevant components of a "polytheistic"

¹²¹ The "amount" may vary with the individuals, but whatever the "amount" for any one person, it is still finite.

synthesis were too inconsistent to meet the "all else subordinate" test with any coherence (for example, if a conscientious objector to war who also intensely believed in the propriety of genocide with respect to all defenseless people), it is most unlikely that the requisite beliefs for that particular religiously based exemption (such as conscientious objection to war) would qualify as "deeply held" under requirement (a) anyway.

In situations in which religious scruples conflict with legally required or forbidden behavior, the inquiry is thus apt to be focused up on the sincerity and intensity of the scruple itself (the belief as to the propriety of that particular behavior), rather than on the inner workings of one's grounds for the belief. And as for possible situations in which scruples regarding particular secularly cognizable behavior were not involved, the question of the internal consistency of beliefs would not be relevant.

Thus, so-called tests (a) and (b) referred to in the "Disturbing Question" would in practice operate similarly if not always identically. If a valid instance should arise in which, for other than religiously neutral reasons, the "all else subordinate" test resulted in religious discrimination, then the *Welsh* "deeply held beliefs" test should prevail. It should be noted that the "imposition of a duty of conscience" aspect, which is the requirement that the strongly held beliefs be "conscientious" ones, does not really help in applying the *Welsh* test previously referred to as part (a) in the "Disturbing Question." Unless we wish to import the psychoanalytically oriented idea that one's conscientiously felt duty must stem from his superego demands, a matter as elusive of proof as any theological claim, stating that one's action or refusal to act must stem from conscience tells us only that the person must deem his decision with respect to the behavior in question to be "right" or "good" or at least preferable to a contrary stance. The party in question could fulfill this "conscience" requirement simply by asserting that he did deem his decision to be "right" or "good" or preferable to alternative courses. For us to go further and declare that behavior is conscientious only when it relates to some "higher" or "more fundamental" concern than some "lower" or "less fundamental" concern is, functionally, to make the same mistake made in constitutionally defining religion to mean belief in a traditionally understood Supreme Being. The mistake is this: Both approaches define what can be religion, in one instance, conscience, in the other, *according to the content of the object or ground of commitment*. A realistic, functional approach to first amendment religious protection prohibits both approaches with equal vigor. The only religiously neutral delineation between religion and nonreligion or *between conscientious and not conscientious* is one confined solely to an assessment of one's subjective commitment. Such a neutral delineation is to be found in the "sincerely and deeply felt" requirement, not in the requirement of "duty to conscience."

All men act in accordance with what they deem to be "good," whatever that term means *to them*. To deny this premise is to undercut the norms of genuine religious liberty and nonestablishment.¹²²

Since the possibility of substantial conflict between tests (a) and (b) in the "Disturbing Question" is more fantasy than likely reality, this essay will continue to treat them as different ways of expressing the same result — a delineation between religion and nonreligion that does not discriminate according to the grounds of one's beliefs. In other words, the definition of religion found in *Welsh*, test (a) above, is seen as carrying the *Seeger* definition, test (b) above, to its logical conclusion, hence the appropriateness of the "*Seeger-Welsh*" label.

3. Too Impractical?

Further considering the *Seeger-Welsh* definition's delineative effect, the problem of administering a requirement of subjective commitment is now to be recognized as a catch-all third ground of critique. To the extent that a standard (or standards) of subjective commitment is (are) utilized in dealing with "religion and state" situations, factual determinations of persons' religious commitment have to be made by various official bodies, both judicial and administrative. Though the *Seeger-Welsh* approach to determining whether a belief is "religious" seems simple enough, how well would it function in day-to-day administration? How would a factfinder determine whether a belief or set of beliefs functioned as a matter of ultimate importance to the alleged believer(s)? Where would one draw the line between ultimate, penultimate, antepenultimate, etc., if the individual or group possessed a scale of more or less deeply felt concerns? When would the locus of decision involve ascertaining the "religion-ness" of the individual or of some group? (All members? Most members? Or a representative sample?)¹²³ Another problem, that of divided or conflicting deeply felt loyalties, was the concern of the previous ground of critique. Even if the problem of "functional polytheism" is resolved in a given case, the factfinder would still be confronted with the task of measuring the depth of commitment. How do we quantify the degree of one's commitment? Is this a matter of common sense? ("Deep commitment is deep; shallow commitment is shallow"?) What factors would lead us to believe our chosen standard(s) of subjective adherence was (were) met? Duration of commitment? But what of "recent converts"? For example, in the conscientious objector situation, what if a registrant were shown to have engaged in war-like behavior five years before claiming his objec-

¹²² The constitutional invalidity of limiting what can be "religion" in the free exercise area by purporting to limit what beliefs can be "conscientious," is discussed in the text accompanying notes 216-24 *infra*.

¹²³ The individual-versus-group problem is apt to arise in connection with any legal definition of religion one chooses, be it *Seeger-Welsh* or whatever.

tion? Or two years before?¹²⁴ Even if a rule-of-thumb "cut-off date" were established, what kind of behavior would prove insincerity or weak commitment regarding a claimed religious belief? Again using § 6(j) conscientious objection as an example, what kind of behavior should be deemed sufficiently "war-like" to cause us to doubt a registrant's sincerity or strength of belief? A conviction for criminal assault? Aggressive speech? What if the registrant's sincere and deeply-felt scruples against killing in war were the result of an agonizing spiritual and psychological struggle to harness his own aggressive impulses of which he was either consciously aware or which he had perhaps repressed from conscious awareness?¹²⁵

One is, at this point, reminded of Whitehead's advice to seek simplicity and then mistrust it. None of the above practical questions suggest easy, intuitively attainable answers. However, it should not be the occasion for undue dismay that these and other questions can be asked concerning this or any attempt at a general formula to deal with an almost infinitely variable dimension of human experience. If the theoretical simplicity of the *Seeger-Welsh* definition is basically valid, this same simplicity should hardly be a hindrance to the development of acceptable refinements, which should and would result from its case-by-case application. One senses that the *lack* of such a theoretical tool leaves decisionmakers in a decidedly worse situation.

Further regarding the problems of practicality, it should be recognized that the burden the definition would place on the factfinder to ascertain sincerity and even strength of subjective commitment is far from being unique to the *Seeger-Welsh* formulation. The criminal law, the law of contracts, indeed the legal system as a whole requires the factfinder to inquire (or purport to inquire) into the human psyche (Greek for "soul" as well as mind) as a normal component of the system's day-by-day operation. The necessity to do so here is no more inherently difficult for the factfinder than determining *mens rea* or even the "reasonable man standard of due care."

4. Oppressive?

A fourth possible means of criticizing the *Seeger-Welsh* definition's delineative effect is to argue that the very process of determining whether an individual's subjective commitment is of sufficient strength to qualify as "religious" necessarily constitutes an unacceptable intervention by gov-

¹²⁴ Concerning these practical considerations in general and the "duration of commitment" problem in particular, I am indebted to Professor John Mansfield's oral discussion of the conscientious objector area in his Church and State course, Yale Law School, Fall, 1971. Blame for any misuse is mine.

¹²⁵ See generally Rapaport, *The Autonomy of the Ego*, 15 BULLETIN OF THE MENNINGER CLINIC 113-23 (1951); the legend of Moses concludes with Moses' confession, "That's what I was made of! I fought against it and that's how I became what I am." *Id.* at 113.

ernment into a person's innermost domain of privacy. Even conceding the religious neutrality of the *Seeger-Welsh* definition, this position would deem any factual inquiry an inherently oppressive intrusion by the civil order into an area (the human soul) about which the civil order has no proper interest whatsoever. The answer to this argument must assume (and require!) that any legal fact-finding process is conducted within the limits of procedural due process generously defined in favor of respect for the dignity of the person. (That this ideal is often not achieved in practice is a problem applicable to the legal system generally rather than peculiarly to matters explicitly regarded as within the "religion and state" area.) With the assumption and requirement of adequate procedural due process protection, the response to this fourth ground of critique is this question: Which of the following two alternatives is more destructive of individual freedom? Again using conscientious objection to military service as an example, the alternatives are as follows. First, conscientious objector status may be denied *in toto*. Force even those whose very souls are unalterably and fervently opposed to killing people into combatant military service. If at any point they refuse to obey orders, punish them according to law regardless of their deeply felt compunctions, thus treating everyone equally and blissfully avoiding governmental inquiry into any individual's beliefs. Alternatively, conscientious objection to combatant or any military service could be allowed but with vigorous inquiry¹²⁶ into the beliefs and feelings of those claiming to object¹²⁷ in order to ferret out pretenders who lack deeply-felt scruples against participating in war.

Even after having taken account of the substantial ambiguities and sometimes grossly erroneous outcomes of any human factfinding enterprise, whether due to unconscious or deliberate bias or to a host of other possible difficulties, and after having also recognized the special uncertainty in assessing any "state of mind," it is still difficult to believe that the second alternative is not preferable to the first in terms of preserving functional religious liberty or, if one prefers another term, human dignity. It is no solution to the necessity of choosing between the alternatives to posit a third alternative so as to allow the military draftee to claim conscientious objector status and be taken at his word without any factual inquiry. That is a fine and easy answer in situations in which political reality and the policymaker's own sense of social responsibility would allow him to treat the mere allegation of religiously based commitment as enough to overcome all competing secular concerns. The hard question posed by comparing the alternatives is: What do you do when the competing secular interests are, *or are thought to be*, great enough to require

¹²⁶ The present machinery for doing this with respect to § 6(j) objectors is indicated at note 65 *supra*.

¹²⁷ One who deemed the inquiry worse than having to fight is, of course, "free" to avoid the inquiry by electing not to claim conscientious objector status.

that real subjective religious commitment be established in order for the religious claim to be worthy of legal deference? In such cases (whether or not conscientious objector service is rightly included as one of them¹²⁸), "inquiry intrusion" seems less objectionable to individual liberty than "conduct intrusion." (The "inquiry intrusion" can, of course, only occur when the party himself elects to seek a religiously grounded benefit or immunity, thus attempting to avoid "conduct intrusion.") It is better that government should try to decide whose claimed religious grounds are bona fide according to a neutral standard of subjective commitment, than to force people to behave in a way repugnant to their deepest beliefs when the social cost of deferring to their scruples is an acceptable one.

IV. FURTHER THEORETICAL PROBLEMS OF RELIGION AND THE STATE

A. *The "Religion-Blindness" of Kurland and Others*

Probably no legal commentator's contribution to the American church and state discussion has received more attention and generated more controversy than that of Professor Philip Kurland's thesis, which he has stated as follows:

The freedom and separation clauses should be read as stating a single precept: that government cannot utilize religion as a standard for action or inaction because these clauses, read together as they should be, prohibit classification in terms of religion either to confer a benefit or to impose a burden. This test is meant to provide a starting point for the solution to problems brought before the Court, not a mechanical answer to them.¹²⁹

Kurland's opposition to any "classification in terms of religion either to confer a benefit or to impose a burden" may fairly be described as a plea for "religion-blindness" on the part of government.¹³⁰ Kurland's thesis is

¹²⁸ A plausible argument can be made that in the case of conscientious objection to military service, particularly when the nation is not involved in an attack on its homeland or in a declared war, the registrant's decision to claim objector status itself ought to be evidence enough of sufficient commitment. This argument would rest in part on the supposition that sufficient extra-legal sanctions exist to deter one from attaching the conscientious objector label to himself unless his feelings against military service were deep. This argument may well apply to more types of religiously based claims for immunity from civil norms than might at first appear. Anyone claiming a religiously based exemption from socially approved and legally sanctioned norms pays the price of somewhat setting himself apart from the majority merely by his act of asserting the claim. It is, however, unrealistic to expect that this argument would carry the day legislatively or judicially in all cases; in other words, society is apt to grant religious exemption from some civil norms only if it is satisfied that bona fide commitment has been established. (Even if the process of ascertaining sincerity or strength of commitment gives no greater reliability than the person's own assertion itself, the ritual serves a real function: it satisfies society's reluctance to grant too easily a license for substantial deviance.)

¹²⁹ P. KURLAND, *RELIGION AND THE LAW* 112 (1962) [hereinafter referred to as P. KURLAND].

¹³⁰ This most apt characterization of Kurland's position was used as the title of Leo Pfeffer's review of the Kurland book; Pfeffer, Book Review, 15 *STAN. L. REV.* 389 (1963).

a tempting one, for at first glance it appears to capture the essence of neutrality and fair play between religion and the state. Also tempting is the apparent but not clearly stated implication that the need for a constitutionally valid legal definition of religion can be (always? usually? sometimes?) avoided, since government could not use religion as a standard for governmental action or inaction.¹³¹

The possibility of avoiding a first amendment definition of religion even under a Kurland regime of "religion-blindness" is a highly debatable matter.¹³² One wonders how the law would always have assurance that it was not "utiliz[ing] religion as a standard for action or inaction" if the law lacked any understanding of the term. Kurland clearly would not be satisfied with a test that simply asked whether the word "religion" appeared in the statute.¹³³ To go much beyond such literalism would seem to require a constitutional definition of religion in order to enforce effectively the prohibition of any religious classification.¹³⁴ Whether or not one agrees with the prior assertion, the more important question to ask of the Kurland thesis is this: Does it promise to effect the kind of "church and state" configuration that would most fully actualize the constitutional values of religious freedom and nonestablishment? Considered from this perspective, Kurland's proposal seems inadvisable.

To begin with, there is no assurance that Kurland's laudable goal of state neutrality with respect to religion will be fostered by government's nonuse of "religion as a standard for action or inaction." Mansfield's example of governmental support of military chaplains¹³⁵ well illustrates this lack of assurance. Despite all the constitutional and other questions that may be raised about maintaining a military chaplaincy, Mansfield's point has merit. Men are conscripted into the military and usually removed from their home surroundings; consequently they are often deprived of, among other things, the support of their religious community. This deprivation for some soldiers of their usual religious life comes at a time of considerable physical danger, when religious support may be most needed. This substantial burden on some soldiers' right of access to their religious community is of course fully permissible under Kurland's formula, since conscription into military service involves no "classification in terms of religion" to grant a benefit or impose a burden. But the Kurland for-

¹³¹ So long as the Court may say what is and what is not a proper religious practice—and it admitted that bigamy cannot be defended on that ground—it must reserve itself exactly that discretion which it forbade to the city officials in *Cantwell*: it "authorize[s] an official to determine whether the cause is a religious one . . . thus establishing a censorship of religion."

P. KURLAND, *supra* note 129, at 61, quoting from *Cox v. New Hampshire*, 312 U.S. 596, 578 (1941).

¹³² See, e.g., Mansfield, Book Review, 52 CALIF. L. REV. 212, 215-18 (1964).

¹³³ See P. KURLAND, *supra* note 129, at 18.

¹³⁴ See Kauper, Book Review, 41 TEXAS L. REV. 467, 470-71 (1963).

¹³⁵ Mansfield, *supra* note 132, at 220.

mula appears to break down when one asks: Ought government be allowed to alleviate its own burden upon religious exercise by providing, as it now does, chaplains to make available religious support to those soldiers who wish it? Since such support involves governmental action utilizing the category of religion to confer a benefit, it would seem to violate the Kurland proviso. Thus a substantial, implicit burden imposed on religion by government could not be corrected by that same government because to do so would require explicit governmental recognition of religion.

Another instance in which Kurland's formula has anything but a neutral result concerns the controversial matter of governmental aid to sectarian education. As Leo Pfeffer has observed, the "no religious classification test" would seem to legitimize tax-supported governmental aid to parochial schools, provided the law authorizing such subsidies included "secular" as well as church-related private schools.¹³⁶ There would, in fact, seem to be no constitutional limit to the scope of such aid under the Kurland thesis so long as the government did not use religion as a standard for its action or inaction. Thus, a broadly framed statute granting aid to "all educational institutions" according to a religiously neutral formula (such as student enrollment) could, as applied, operate so that tax monies could even support the total budget of sectarian theological seminaries. To posit any similarity between such a result and, for example, the thinking of Madison's *Memorial and Remonstrance* would take a most vivid imagination.

The above two examples, military chaplaincy and sectarian religious education,¹³⁷ suggest that "religion-blindness" would have more of a helter-skelter than neutral effect on religion-state relations. In the former example, the effect would be substantially burdensome on religion; in the latter, substantial favoritism to religion on the part of government would be permitted. The "blindness" metaphor is thus on point but incomplete; not only would government be *blind* with respect to religion, it would also be *affecting* religion in all sorts of ways, while being incapable of assessing the consequences of its actions with respect to religion. Perhaps a more complete metaphor would be that of a blind giant walking through a village. At one moment our blind giant might be ripping the roof off the village church; in the next moment he might be physically supporting the roof from falling onto the pews. In both instances, he would be blissfully oblivious of the consequences of his actions.

It should also be asked whether it is really possible for the giant (government) to be religion-blind. Consider again the question of state fi-

¹³⁶ Pfeffer, *supra* note 130, at 392, 402.

¹³⁷ After he had just considered 20 situations of church-state impact were Kurland's thesis to be adopted, Pfeffer observed, "I could go on almost indefinitely. But this is a game any number can play. Perhaps the reader may want to amuse himself by thinking up other instances in which application of the Kurland imperative would wreak havoc with existing practices and patterns." *Id.* at 406.

nancial aid to private education. By authorizing grants to "all private educational institutions," wouldn't the state still have to "open its eyes" and make a classification with respect to religion in order to confer (or not confer) the benefit?¹³⁸ In granting aid to sectarian religious institutions, wouldn't the state in effect be saying, "We officially recognize the teachings of X religion as includable within the larger category of 'education' "? If it excluded the religious institution from its general program of aid to private education, the state would be saying, "We officially refuse to recognize the teachings of X religion as includable within the general category of 'secular education' because these teachings are those of a religious body." Whether the state includes or excludes religious institutions from its aid to education, it must, in effect, act with respect to the category, "religious education." This is so even though the term "religious education" or some equivalent category is not expressly recited in the statute.

The more important basis for rejecting the doctrine of religion-blindness is its potential adverse effect on religious freedom. Kurland and those who concur with him rely on the speech, press, assembly, and petition for redress of grievances clauses in the first amendment as sufficient to protect free exercise of religion. This position is harmless enough when the matter at issue only involves religious belief, religious speech (including "symbolic speech"), religious publication, religious assembly, petition, or some combination of these. But reference must again be made to the *Seeger-Welsh* understanding of religion as a commitment to what one believes is of ultimate importance. Such commitment is not confined to internal belief, speech, press, assembly, and petition for redress of grievances. Religious commitment involves the way one lives one's life, which by definition must include more than one's beliefs and the communication of ideas. Potentially, any human behavior is includable if the requisite subjective commitment is present.

The idea of allowing a person's religious convictions to give him any special consideration with respect to his legal duties in the civil order has been rejected by others besides Kurland. No one's rejection of the idea has been more vigorously presented than that of Justice Frankfurter:

The religious liberty which the Constitution protects has never excluded legislation of general scope not directed against doctrinal loyalties of particular sects. Judicial nullification of legislation cannot be justified by attributing to the framers of the Bill of Rights views for which there is no historic warrant. Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant

¹³⁸ The discussion of this example, for the remainder of this paragraph in the text, owes a pervasive indebtedness to Mansfield, *supra* note 124; any misuse is mine.

concerns of a political society does not relieve the citizen from the discharge of political responsibilities. The necessity for this adjustment has again and again been recognized. . . . In all these cases the general laws in question, upheld in their application to those who refused obedience from religious conviction, were manifestations of specific powers of government deemed by the legislature essential to secure and maintain that orderly, tranquil, and free society without which religious toleration itself is unattainable.¹³⁹

The *Gobitis* Court upheld the power of the public schools, pursuant to state regulation, to expel children of the Jehovah's Witnesses sect for refusing to salute and pledge allegiance to the American flag. When the Supreme Court overruled its *Gobitis* holding in *West Virginia State Bd. of Educ. v. Barnette*,¹⁴⁰ Justice Frankfurter vigorously reiterated his earlier position, this time in a dissenting opinion:

Religious minorities as well as religious majorities were to be equal in the eyes of the political state. But Jefferson and the others also knew that minorities may disrupt society. It never would have occurred to them to write into the Constitution the subordination of the general civil authority of the state to sectarian scruples.

The constitutional protection of religious freedom terminated disabilities, it did not create new privileges. It gave religious equality, not civil immunity. Its essence is freedom from conformity to religious dogma, not freedom from conformity to law because of religious dogma. . . . Otherwise each individual could set up his own censor against obedience to laws conscientiously deemed for the public good by those whose business it is to make laws.¹⁴¹

Justice Frankfurter went on to say that:

The individual conscience may profess what faith it chooses. It may affirm and promote that faith — in the language of the Constitution, it may "exercise" it freely — but it cannot thereby restrict community action through political organs in matters of community concern, so long as the action is not asserted in a discriminatory way either openly or by stealth. One may have the right to practice one's religion and at the same time owe the duty of formal obedience to laws that run counter to one's beliefs.¹⁴²

Justice Frankfurter's argumentation rests in part on his premise that courts cannot exclude from a particular legal duty *only* those who religiously or conscientiously object; he saw only two possible choices—a statute must either be upheld or struck down for all those within its intended scope.¹⁴³ This premise is rejected in this essay and, more impor-

¹³⁹ *Minersville School District v. Gobitis*, 310 U.S. 586, 594-95 (1940) (footnotes omitted).

¹⁴⁰ 319 U.S. 624 (1943).

¹⁴¹ *Id.* at 653.

¹⁴² *Id.* at 655-56.

¹⁴³ "A court can only strike down. . . . It cannot modify or qualify, it cannot make exceptions to a general requirement." *Id.* at 651-52.

tantly, was rejected by the Supreme Court in *Sherbert v. Verner*.¹⁴⁴ However, Justice Frankfurter's reasoning quoted above is still relevant to the question of whether religious or conscientious objectors should be allowed any special immunity from adherence to general legal norms. His position centers upon the fear that taking into account a persons' religious/conscientious scruples vis-à-vis their legal duties would result in social chaos and in an intolerable burden upon the judiciary.¹⁴⁵ This fear must be regarded as being grossly out of proportion to any conceivable outcome for at least three reasons.

First, as already noted, it has been firmly (and rightly) decided that religious or conscientious grounds do not excuse conduct resulting in substantial and genuine social harm.¹⁴⁶ The correctness of this proposition as a controlling principle is virtually uncontested. Opinions do of course differ as to exactly where "substantial and genuine" social harm should begin and thus where the domain of individual prerogatives should end. The Supreme Court's marking of this domain has at times shown a tendency to find substantial social harm more readily than the actual situation seemed to indicate.¹⁴⁷ (However, there have been exceptions.¹⁴⁸) Although any such assessment depends on one's own value judgments, it would be difficult to convince most knowledgeable observers that the Court has "over-protected" religious and conscientious idiosyncrasies to the detriment of social control. The aforementioned principle that has guided the Court, namely, that religious or conscientious commitments do not excuse behavior causing real and significant social harm, would in no way be undercut by anything being advocated in this essay.

Second, with reference to the fear of an undue burden on courts and administrative agencies, it must be remembered that the idea of limited religious/conscientious immunity to legal norms is being advocated in the context of a democratic society. Even after allowing for its substantial imperfections, a reasonably democratic government will not often promulgate legal norms contrary to the wishes of the majority of its citizens. (If such norms do exist in significant dimension, one does not, by definition, have even an approximate democracy.) Not only are *most* people in a democracy usually in accord with most of its legal norms, but a democratic government is unlikely to adopt many legal norms that are contrary

¹⁴⁴ 374 U.S. 398 (1963).

¹⁴⁵ Concerning Justice Frankfurter's qualms about the potential judicial burden, see 319 U.S. at 658-61. "[I]t presents awful possibilities to try to encase the solution of these problems within the rigid prohibitions of unconstitutionality." *Id.* at 661.

¹⁴⁶ *E.g.*, *Reynolds v. United States*, 98 U.S. 145 (1878). Arguably, the state's restriction upon religious freedom here was more onerous than a "substantial and genuine social harm" test would prescribe.

¹⁴⁷ *E.g.*, *Prince v. Massachusetts*, 321 U.S. 158 (1944) (child labor law overrides religiously grounded activity of the selling by a minor of Jehovah Witness literature).

¹⁴⁸ See, *e.g.*, *United States v. Ballard*, 322 U.S. 78 (1944), which is discussed in note 29 *supra*.

to the deeply felt wishes of a numerically large minority of its citizens. The political clout of a large enfranchised minority will usually require political compromise on the part of the majority. Though the legislative outcome may not perfectly satisfy anyone, it is not apt to be strongly antithetical to any large minority's demands. And the more intensely a large minority feels about a particular issue, the more it is apt to make its feelings count in the legislative process. Thus, to the extent that our society's legislative process is democratically operated, the number of persons feeling intensely ("religiously") opposed to any given legal norm is apt to be small.¹⁴⁹ The burden of administering claims of religiously based immunity would be limited accordingly.

But, one might ask, what about the "Let George Do It" problem? Wouldn't there be a large number of persons who, though not themselves opposed to the enactment of a particular legal norm in general, would be "religiously" opposed to its being applied to them personally? The military draft in wartime should be a good example of this problem. Not only is the legal duty involved uniquely onerous, but the government has usually made some legislative provision for conscientious objection. What more inviting situation for numerous claims could be envisioned? We should therefore expect an onslaught of people religiously opposed to their *own* personal participation in war and therefore an onslaught of military conscientious objector claimants.

The experience of the nation in this area has not generally borne out the above expectation. As Mansfield observes:

[A]t no time in the country's history, at least not since the Revolution, has the refusal of conscientious objectors to perform military service constituted a serious threat to the safety of the nation. The number of persons involved has always been comparatively small, and the granting of an exemption has never constituted a serious drain on the manpower necessary to carry on military operations. This fact doubtless furnishes part of the explanation of why Congress has been willing to grant exemption and why the public has by and large accepted the exemption.¹⁵⁰

¹⁴⁹ A possible exception to the likelihood of the number being small is this. Situations could arise in which there was intense feeling about an issue on the part of those deemed too young to be entitled to have their wishes counted in the voting-political-legislative process. (This problem was reduced, not eliminated, by lowering the voting age to 18.) When such situations do occur, these persons, denied their day at the ballot box, seem especially entitled to present their religiously grounded objections to whatever legal duty is being imposed on them—even at the cost of a heavier administrative burden.

¹⁵⁰ Mansfield, *supra* note 26, at 45. Precise figures are difficult to obtain. Concerning the Civil War,

[t]he total of the figures available is 1,071 with 406 of that number representing non-combatants recorded in one eight month period. Speculation would put the total number of religious objectors in the Civil War at somewhere between 1,200 and 1,500 men—a small enough percentage of the more than two million men that the North and the South committed to battle.

L. SCHLISSEL, *Preface in CONSCIENCE IN AMERICA* 91 (1968). Concerning World War II, "[the Selective Service System's] own estimate is that there were 25,000 conscientious objectors.

Exemption from wartime military service is clearly the "acid test" for assessing the administrative feasibility of religiously based immunities from legal norms. The incentives for claiming an exemption are at their greatest here, yet even this experience suggests that most people will not choose to attempt to exempt themselves from socially decided norms. One can only speculate on the reasons for this.¹⁵¹ Whatever they are, sufficient extralegal sanctions, internal or external, are at work to generate compliance with laws that are seen by a strong community majority as reasonable and generally necessary for the social good. In a democratic society, laws not commanding such compliance by the vast majority are themselves in need of serious reappraisal.¹⁵²

Despite the foregoing considerations, one may still decide, on a cost versus benefit basis, that government cannot afford the administrative expense of taking individuals' deeply felt scruples into account. However, that judgment ought to be made in the light of what other matters are presently judged important enough to occupy the time of courts and administrators.¹⁵³

Third, intimations of sure social breakdown were every man allowed to "censor" the demands of government according to his own conscience serve only to knock down a straw man. The position at issue is not one of government's abdicating its authoritative responsibility in the secular sphere. It is government itself (via its own authoritative decisionmakers) that must decide whether conflicting secular interests are insubstantial enough to allow taking a party's relevant religious/conscientious commitments into account in a given decision. And it is government itself that must judge the sincerity and intensity of religious/conscientious commitments when *it* deems such a determination relevant. Even with its eyes open as to persons' religious commitments, government is still the "giant" in this world vis-à-vis conscience or church.¹⁵⁴ This was so even when the church was at its medieval height of power. Henry VIII was

Other researchers judge the number to have been closer to 50,000, a small percentage of the 13 million Americans who served in the armed forces between 1941 and 1945." *Id.* at 214. In 1965, there were

2,416 persons classified I-O and performing civilian work of national importance and 8,745 classified I-O but not yet called by their draft boards. In addition, there [were] approximately 7,000 persons classified I-A-O for non-combatant service in the armed forces. Fewer than 100 persons [were] "confirmed absolutists," who will not even register for the draft or refuse to cooperate in other ways that make them liable to prosecution.

Mansfield, *supra* note 26, at 45, citing Wall St. J. Sept. 22, 1965, at 16, cols. 4, 5.

¹⁵¹ Cf. note 128 *supra*.

¹⁵² In view of the immense human and economic loss caused by war, any military activity by the state lacking overwhelming popular support seems clearly unwarranted in a *democratic* society.

¹⁵³ See, e.g., text accompanying notes 159-61 *infra*.

¹⁵⁴ That government may indeed appear dwarf-like in its attempt to regulate giant economic interests should not cloud the metaphor appropriate to describing government vis-à-vis a human conscience.

hardly the first European monarch to realize his sovereignty over social decisionmaking this side of heaven. He was only a bit more forthright about the matter than were some others. Whether or not one agrees with this historical judgment, one must concede that, as between government and an individual conscience, government carries the club; it is government that can decapitate or imprison or deprive (or allow dominant economic power to deprive) an individual of freedom in a myriad of subtle and not so subtle ways.

The viable alternative to Justice Frankfurter's position is merely this: Let all authoritative secular decisionmakers take into account persons' subjective religious scruples that are relevant to the decision at hand. This obviously does not give the individual the legal right to exempt himself from the requirements of law for religious reasons. Rather, it gives the individual the right to have his religious scruples recognized as a legally relevant factor *along with all other pertinent factors* to be weighed by the governmental decisionmaker in deciding the outcome.

Actually it is quite misleading to speak of "special religious immunity" for persons with deeply felt scruples. The "special immunity" language is misleading not only because it wrongly suggests that the immunity must follow automatically whenever religious grounds are claimed; it is also misleading in that it suggests that categories of immunity (full or partial) are something very rare in the legal system. Nothing could be further from the truth. The criminal law, for example, is replete with "special(?) exceptions" that can function to absolve one from liability or to mitigate the severity of the offense or the sanction imposed or both. Depending on the crime involved, such diverse factors as (among others) ignorance or mistake, public or domestic authority, prevention of crime, self-defense, defense of others, defense of home or other property, necessity, coercion, provocation, immaturity, mental disease or defect, record of previous good character, peculiarities of an identifiable sub-culture, and even entrapment may serve to eliminate or reduce criminal liability or punishment for conduct generally deemed criminal.

A similar dimension of "special(?) exceptions" may be found in any area of the law, from contract and property to constitutional law and taxation. (In the latter, it has developed into an inscrutable, if not perverse, art.) These observations are hardly news to anyone who has gone past the first month of the traditional law school exposure and seen one general rule of law after another crumble under the weight of exception after exception, with exceptions to the exceptions, and on and on.

In the light of a legal system that is itself virtually a "law of exceptions," the question must be asked: Why then are at least some knowledgeable persons, themselves having a deeply felt commitment to libertarian values, opposed to having a court ever consider an individual's reli-

gious scruples as a valid factor in its decisionmaking? The answer or answers must lie somewhere else than in a fear of resultant civil chaos. (Despite the immense diversity of religious sects and persuasions in this country, civil disorder due to persons' engaging in the free exercise of religion has never ranked in our list of the top ten pressing social problems.) Three possible answers other than fear of chaos invite consideration:

1. Governmental Ignorance About Religion

There appears to be a particularly frequent incidence of acute judicial humility whenever matters of religion are, as they sometimes must be, interjected into litigation. The extreme reluctance of American courts to decide the merits of a property dispute if ecclesiastical issues are involved¹⁵⁵ exemplifies this humility. In *Watson v. Jones* the Supreme Court verbalized its own doubts about being able to deal with ecclesiastical matters:

Nor do we see that justice would be likely to be promoted by submitting those decisions [of an ecclesiastical body] to review in the ordinary judicial tribunals. Each of these large and influential bodies (to mention no others, let reference be had to the Protestant Episcopal, the Methodist Episcopal, and the Presbyterian churches), has a body of constitutional and ecclesiastical law of its own, to be found in their written organic laws, their books of discipline, in their collection of precedents, in their usage and customs, which as to each constitute a system of ecclesiastical law and religious faith that tasks the ablest minds to become familiar with. It is not to be supposed that the judges of the civil courts can be as competent in the ecclesiastical law and religious faith of all these bodies as the ablest men in each are in reference to their own. It would therefore be an appeal from the more learned tribunal in the law which should decide the case, to one which is less so.¹⁵⁶

Whatever the possible spiritual value of such humility, one wonders about its appropriateness on the part of those who are charged with deciding disputes between parties. In any intra-church property dispute, at least one interested party feels anything but content with the decision of that religious body's "ablest men." (*Quaere*, how does the Court ascertain who is the final earthly decisionmaker within a given religious group?) Is it consistent for a court to say, "We are too untrained in ecclesiology to help private parties decide their disputes even though the decision would have secularly cognizable consequences (such as who gets some valuable property)," while that same court engages daily in decisionmaking covering other fields in which it equally lacks expertise? Why not also

¹⁵⁵ See *Presbyterian Church in the United States v. Mary Elizabeth Blue Hall Memorial Presbyterian Church*, 393 U.S. 440 (1969); *Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church in North America*, 344 U.S. 94 (1952); *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871).

¹⁵⁶ *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 729 (1871).

leave the compelling legal problems relating to nuclear energy, environmental pollution, medical care, patentability, automatic date processing, etc., to the best trained experts? The obvious answer, the need for a disinterested decisionmaker with an overall social sense, applies equally to ecclesiastical disputes involving secularly cognizable interests. (Hopefully, courts are not saying to ecclesiastical bodies, "Your problems simply aren't worth our trying to understand them; but other categories of disputes are.")

Even if courts continue to shy away from offering much help in adjudicating the secular consequences of spiritual factionalism within religious associations, their intellectual humility has no application with respect to a neutral, nontheological, nonecclesiastical definition of religion like *Seeger-Welsh*. If one can understand what is meant by such profundities as, "Put your money where your mouth is," or, "Religion is not what you do only on Sunday morning, but how you live the rest of the week," one can understand the theoretical content of this essay's explication of the *Seeger-Welsh* definition of religion.

2. Governmental "Incompetence" as to Religion

A more valid reason for judicial reluctance to "meddle in religion" has been alluded to earlier in this essay. It involves a second type of judicial or, more broadly and more accurately, governmental, self-designated "incompetence." The law, and thus the judge and legislator, "knows no heresy" not because of theological ignorance, but because the first amendment forbids religious prescription on the part of government. This concern does constitute a cogent reason for judicial reluctance to delve into ecclesiastical disputes, even when real wealth is at stake. Unwarranted "judicial activism" here would create a real danger to religious freedom and nonestablishment. A case from Great Britain¹⁵⁷ is illustrative of this danger. The Free Church of Scotland had merged with the United Presbyterian Church to form a new body, the United Free Church. However, dissident members of the pre-merger Free Church, who refused to accede to the merger, sued for recovery of the Free Church's property on the ground that its transfer to the newly created United Free Church constituted a "breach of trust." Holding for the dissident Free Church group on appeal, the House of Lords required that the pre-merger Free Church's property then in the hands of the new United Free Church be returned to the pursuers as trustees and "lawful representatives" of the pre-merger denomination. The Lords reached this result essentially because they viewed the newly formed United Free Church's failure to adhere to the pre-merger Free Church of Scotland's position favoring state establishment (support) of religion as a breach of faith with the wishes of the past donors of the pre-merger church's property. In so holding, the Lords were in effect say-

¹⁵⁷ *General Assembly of Free Church of Scotland v. Overtoun*, [1904] A.C. 515 (Scot.).

ing that a church is (and ought to be?) a body of people professing belief in a system of unchangeable doctrines. In arguing for the right of the Free Church majority to effect the merger, with the consequent transfer of property to the newly created body despite some change in church doctrine, dissenting Lord Macnaghten was implicitly saying this: A church is (and ought to be?) a body of people engaging in an ongoing corporate religious experiment who can, in accordance with their own legislative procedure, develop and alter their stated positions (Wholly? Or as to "non-essential" matters only?) from time to time. Had this case been decided under the first amendment, *neither* view of what is the nature of a church would have been within the competence of government to espouse, unless the pre-merger Free Church itself had all along espoused a reasonably clear position on the scope of permitted and unpermitted ecclesiastical change. American courts are scrupulously adhering to both the religious freedom and nonestablishment clause when they refuse to do a religious group's religious decisionmaking for them. However, situations can arise in which the religious body's own position, arrived at in accordance with its own procedural rules, is stated in such a way that government could determine whether or not the sect's own duly promulgated ecclesiastical law is being flouted without the governmental decisionmaker's implicitly or explicitly making religious prescriptions. For example: Church Y's constitution reads as follows: "Y Church shall meet without fail at 11:00 a.m. every Sunday morning. This policy can only be changed by unanimous vote of all members." The majority of Y Church later vote to merge with Z Church and agree that the new YZ Church shall meet only once a month. In such a case, a court could intervene to prevent the transfer of Y Church's property to the YZ Church without in any way prescribing ecclesiology or theology. The court would simply be honoring the contractual intent underlying this voluntary association with respect *only* to the secularly cognizable (here, property) consequences of that voluntary agreement. However, if the religious body's proviso at issue in the litigation was, "This church shall always do God's will," or, "This church shall always adhere to the Holy Bible," a governmental decisionmaker could only ascertain whether the association's own procedural ground rules for decision-making were being violated. For a court to go beyond that and determine such substantive religious questions as adherence to a creedal statement would amount to the state's becoming a theologian. The conclusion voiced in this last statement, while appropriate to the examples contained therein, should not be allowed to spill over into the type of situation reflected in the 11:00 Sunday morning example. There, a court's refusal to intervene in the dispute on the substantive merits would deny "religiously-tainted" parties the same protection given all others, namely, the right to have lawful contractual obligations honored with respect to their secularly cognizable

consequences. In other words, an over-extension of the "governmental incompetence with respect to religion" rubric can result in the government's doing what it also has no competence to do under the first amendment, namely, to discriminate against religion.

Discrimination against religion by over-extending the idea of governmental incompetence would occur with respect to the free exercise of religion under Frankfurter-Kurlandian religion-blindness. There is simply no way that the state can refuse to take into account an individual's adherence to his deeply-felt life commitment or commitments in any particular governmental decision and suppose itself to be a religiously "neutral" government. But by what understanding of "neutrality" could the government treat substantially affected economic interests as legally relevant to a given decision and treat substantially affected individual consciences as irrelevant? The "incompetence" argument simply won't do here. Government is still the giant vis-à-vis the rest of us.¹⁵⁸ Either it will be a fair and just giant or it will be an irresponsible one (whether by cruelty, favoritism, neglect, ignorance or incapacity). The giant can no more protect religious freedom by ignoring it than it can protect other personal liberties or economic rights by ignoring them.

Nor is the state justified in ignoring a person's subjective commitment in social decisionmaking because its roots are too intangible, too "merely mental" a matter. Acting under enabling constitutional authority, Congress has moved to protect the external manifestations of intellectual expression by providing patent and copyright protection. (Unlike the protection of religious freedom, patent and copyright protection is merely permitted by the Constitution rather than being constitutionally required. And unlike the protection of religious freedom, copyright protection always necessarily and inherently conflicts with the public's first amendment freedoms of speech and press to the extent that we are forbidden to echo the words, music, and visual expressions of their creators.) Prestigious courts have found it a proper use of their time and authority to ask, for example, whether "Captain Marvel" infringed upon the idea manifestations in the "Superman" series of comic strips;¹⁵⁹ whether a record of a team of persons' observations of horses' positions at the start, various intermediate stages, and finish of horse races, including distances between horses at each stage, would be entitled to the considerable economic protection pro-

¹⁵⁸ Note that we tend only to object to the giantness of government when it acts to restrict *our* activities. When we need a policeman, judge, or soldier to protect us from harm from others, we tend to accept government's giantness with unquestioning enthusiasm. For those who are generally unhappy with the government-as-giant motif, *i.e.*, who are unhappy with any mode of authority, the unhappy alternative is anarchy, in which an individual has one or more substitute giants to fear. This is a poor alternative to an authority system in which the individual can himself comprise a part of the giant's stature, *i.e.*, can be a part of government.

¹⁵⁹ National Comics Pub., Inc. v. Fawcett Pub., Inc., 93 F. Supp. 349 (S.D.N.Y. 1950), *rev'd*, 191 F.2d 594 (2d Cir. 1951).

vided by the copyright law;¹⁶⁰ and whether Jerome Kern's use of an eight note counterpoise to the chorus melody of "Kalua" was an infringement of a "substantial component part" of plaintiff's song, "Dardanella."¹⁶¹

The external manifestations of psyches, dealt with by courts in the above examples, were deemed interests worthy of "special (?) protection" in governmental decisionmaking. Should the behavioral manifestations of religious commitment be treated with less deference? Is "psyche as soul" to be accorded less consideration than "psyche as mind"? If one argues: (a) that the expressions of psyche in the copyright examples are entitled to be taken seriously by the decisionmaker because substantial wealth allocation is at stake (which it very often is!); and (b) that the failure of the religion-blindness school to take religious conviction into account in decisionmaking is justifiable if no economic detriment is visited upon the religious claimant, then one is simply restating the functional bias of the religion-blind stance's operative effect. Contrary to the humane values of its advocates, the unintended but utterly real consequence of religion-blindness is to favor material (economic) values and to discriminate against the non-economic values of the human spirit.

It is no answer to this criticism to argue that the individual human spirit has already been sufficiently taken into account in the process of legislative decisionmaking. In the first place, it is primarily economic interests and economic considerations that shape the legislative output. More importantly, we are dealing here with a constitutional imperative: the state *must not* prohibit religious free exercise. If the legislature fails to treat individuals' religious scruples with due deference, then the courts *must* correct the oversight. (Such judicial protection is the minimal requisite for any constitutional freedom, let alone for one that the Supreme Court has described as standing, along with freedom of speech and press, "in a preferred position."¹⁶²) The free exercise clause must be understood as invalidating any implicit application of the notion that external expressions of human psyches are worth governmental consideration only if they carry a price tag, only if they have economic value. (Granted, the religion-blindness approach does retain the general first amendment protection for economically valueless *belief* and *speech*, provided there are no external manifestations (overt acts) that conflict with other legally sanctioned interests, that is, as long as the belief and speech fail to have any tangible consequences that conflict with all other legalized social norms in the physical world.)

¹⁶⁰ Triangle Publications, Inc. v. New England Newspaper Pub. Co., 46 F. Supp. 198 (D. Mass. 1942).

¹⁶¹ Fred Fisher, Inc. v. Dillingham, 298 F. 145 (S.D.N.Y. 1924). (In this case and in those just cited (in notes 159 & 160 *supra*) there were, of course, issues other than those mentioned in the accompanying text.)

¹⁶² *Murdock v. Pennsylvania*, 319 U.S. 105, 115 (1943).

The "material values bias" effect is illustrated by the position espoused by Weiss. (It should be reiterated that this biased effect is an unintended one. It is inherent in the religion-blindness approach, and ought not be imputed to those who advocate governmental religion-blindness in the belief it will actualize religious neutrality.) The scope of religious freedom recommended by Weiss is much the same as that prescribed by Justice Frankfurter and Kurland. However, Weiss seeks to soften the effect of Justice Frankfurter's judicial refusal to allow any religiously or conscientiously grounded immunity to what are otherwise constitutionally permissible legal requirements. Weiss argues:

[W]e have to distinguish three realms of behavior: (1) the realm of pure belief that everybody would grant is private; (2) the realm of religious action which may have public manifestations; (3) the realm of action clearly public. It is usually agreed that the law cannot trifle with the first — no legislature may pass a law commanding people to believe in God. The issue is either to distinguish the latter two, or to provide principles to justify legal regulation of the second. We will do the former.

The distinction in tentative form is: religious action is action the function of which is *only* to establish and perpetuate a private meaning for individuals — a meaning given to it by a religion. Religious actions create results whose effects are private, felt only by those who believe or are concerned with belief. Some actions will occur which have real meaning or effect only in the world of ideas. Thus, purely symbolic actions may be distinguished from actions, such as polygamous cohabitation, which have tangible, worldly consequences. And among those actions which effect only the world of ideas are religious actions, defined as such by the religion which adopts them. That is, religious action takes place in but does not exhaust the realm where actions induce, signify, or reject beliefs. Public action, on the other hand, is that which affects others in ways not limited to their belief. Further, these effects, for the purpose of the law, must already have been described, prescribed, or proscribed by an authoritative decision of the governing political powers. . . .

Religion serves as no defense to a law regulating what we have defined as public actions. Only if action can be seen to be exhausted in an individual's private affirmation, and relates to his assumption of a perspective, is it religious action and thereby sacrosanct.¹⁶³

Arguably, Weiss' formulation succeeds in somewhat liberalizing the Frankfurter-Kurlandian treatment of religious freedom. He "extends" the scope of free exercise of religion to cover religious action with "public manifestations" but with only "private" effects (effects "only in the world of ideas"). Weiss is therefore able both to agree with the *Barnette* case's invalidation of compulsory flag saluting and to concur substantially with dissenting Justice Frankfurter's approach to religious freedom. True to the substance of Justice Frankfurter's position, Weiss insists that in the realm of "public action" (action "which affects others in ways not limited to their belief," or

¹⁶³ Weiss, *supra* note 104, at 608 (emphasis in original).

actions "which have tangible, worldly consequences"¹⁶⁴), religious belief cannot serve as a defense. According to Weiss, "Mr. Justice Frankfurter's argument *that religious rights are irrelevant once one is securely in the realm of public action* is cogent."¹⁶⁵

An initial response to Weiss' position is to note that the admittedly needed improvement of Justice Frankfurter's approach in *Barnette* was a needed correction applicable to *all* the first amendment freedom of expression guarantees, not just freedom of religion. Freedom of speech, press, etc., mean very little if their scope does not include "public manifestations" having only "private" (idea) effects. After allowing for limited exceptions, such as commercial fraud and certain instances of defamation, this public-manifestations-private-effects scope provides the general first amendment guarantees of free expression with their minimum acceptable amount of elbow room.

The basic criticism of Weiss' formula is simply this: It has unambiguously failed to correct the inherent bias of Frankfurter's and Kurland's approach to the scope of religious freedom. Whenever one enters the sphere of "public action," that is, exercises his deeply felt religious convictions so as to affect any other legal interest (other than merely possibly affecting the beliefs of others), one would, according to Weiss' proposal, have to subordinate his religious convictions to all other secularly cognizable interests. By confining the sphere of religion to the "world of ideas," one makes a societal stepchild out of religious commitment vis-à-vis all other values, rights, and interests that the state favors enough to deem relevant in its decisionmaking. Even when one enters the sphere of public action, he is entitled to have his religious commitments taken into account along with all other legally recognizable rights. If equal protection and substantive due process (for some inscrutable reason) do not of themselves constitutionally require this, the free *exercise* of religion clause must.

It is in no way suggested here that the rights of individual conscience are inherently superior to all other legal rights; rather, the plea is a much more modest one. *Don't treat religious/conscientious scruples as inherently inferior to all other legal interests simply because the expression of these scruples operates in the "public sphere."* Recognize that these scruples are legally relevant and balance them against other personal and economic rights that are at stake in the particular legislative, judicial, or administrative decision. Balancing religious/conscientious scruples against "secular (?)" interests (and against other conflicting religious/conscientious scruples in some cases) is not to be regarded as an easy task. Attempting to do justice amongst competing interests is never as simple as regarding one class of interests as ipso facto inferior to others. However, adding religious/

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 609 (emphasis supplied).

conscientious scruples to the already diverse collection of values that any government in a complex society (or in any society) is responsible for protecting does not make the decisionmaker's "balancing act" a significantly more difficult one than it already is. (It could even be argued that the job is made *less* difficult because taking into account people's deeply felt beliefs is more in accord with the common sense inclination of any decisionmaker who is trying to be fair. "Being fair" in the most basic sense means considering *all* values affected by the decision. It thus may well be easier to reach a satisfactory outcome if one vital aspect of experience, the subjective commitments of persons, is not artificially disregarded.)

It is essential to note further that, under the *Seeger-Welsh* approach to legally recognizable religion, the *only* expressly "religious" criteria to be used in the decisionmaker's balancing are sincerity and intensity of subjective commitment.¹⁶⁶ *All other criteria* must be secularly cognizable, such as the following: Will anyone's physical safety be harmed or threatened, and to what extent?; Will anyone's right to peace and quiet, privacy, etc., be harmed or threatened, and to what extent?; Will the decision enhance physical health, and to what extent?; and so on. Even the expressly religious criteria may be described as secularly cognizable: how much emotional pain will be inflicted on the individual or individuals if the state requires that their subjective commitments be violated in the matter in question?

In objecting to religion-blindness' inherent bias against the external actualization of persons' individual religious scruples, one may be implying that his own position is "neutral" or value-free. Such an implication would be sheer nonsense. There is nothing neutral about arguing for legal protection for individual consciences. More than a few persons would argue that there is already too much leeway allowed individual idiosyncrasy in our "permissive" (?) society. There is nothing neutral about a commitment to actualizing the constitutional value of religious liberty. The bias being advocated here is this: In a society that has succeeded in bestowing upon itself an overabundance of most material goods,¹⁶⁷ the right question to ask is, "How do we move effectively to enhance religious freedom?" In other words, how do we move effectively to provide the individual not merely freedom of belief, speech, etc., but to provide him (or her) genuine way-of-life-freedom? Religious freedom either involves the way one lives one's life or it involves nothing of enough importance to merit its special mention in the Bill of Rights. If we decide that religious freedom does not involve way-of-life-freedom, then we may as well be honest enough to deny it any constitutional meaning of its

¹⁶⁶ Otherwise the decisionmaker, contrary to the establishment clause, would be evaluating the social worth of religious claims according to what is believed.

¹⁶⁷ We have of course not succeeded in producing the goods humanely or in distributing them justly. "Over-abundance" is thus an idea not yet experienced in certain sectors.

own and rely solely on the other first amendment expression guarantees (speech, press, etc.), thus concluding that the free exercise clause is itself purely a matter of historical interest. In other words, we should make explicit our judgment that free exercise of religion was given a special place in the Bill of Rights for historical reasons now only of antiquarian concern.

3. Nonestablishment Neutrality

The third and perhaps most important reason for a person's objection to legal decisionmakers' taking individuals' religious scruples into account is the fear that to do so would violate the establishment clause. Whether this fear is justified depends very much on what is meant by the first amendment admonition, "Congress [and, through the due process clause of the fourteenth amendment, the states] shall make no law respecting an establishment of religion. . . ." The Supreme Court has stated clearly that the establishment clause means more than "forbid[ding] . . . governmental preference of one religion over another."¹⁶⁸ Therefore a federal or state law does not necessarily satisfy the establishment prohibition simply because it "aid[s] all religions."¹⁶⁹ Rather, the principle that nonestablishment of religion forbids nonincidental governmental aid to religion, even when it offers the aid to "all religions" on a nondiscriminatory basis, has been often espoused by the Court.¹⁷⁰ This principle need not be rejected in order to adhere to the additional principle argued for in this essay, namely, that decisionmakers should not exclude persons' relevant religious commitments from consideration in their legal decisions. This is so because the two principles do not necessarily conflict with each other. On the same day that the Court in *Abington School Dist. v. Schempp* explicitly reaffirmed the principle that nonestablishment of religion is not satisfied by aid to all religions,¹⁷¹ it was able to apply the additional principle just stated above, holding in *Sherbert v. Verner* that the free exercise clause forbids a state from denying unemployment compensation to one whose religious scruples prevented her from accepting Saturday employment.¹⁷² Whether, as in *Sherbert*, the free exercise clause is deemed to *require* the holding that the litigant's religious interest was sufficient to override the state's regulatory interest or whether, as in the area of military conscientious objection, the judgment that the interest of persons' religious liberty should override other state interests is deemed a constitutionally *permissible* decision of legislative policymaking,¹⁷³ *neither type*

¹⁶⁸ *Abington School Dist. v. Schempp*, 374 U.S. 203, 216 (1963).

¹⁶⁹ *Everson v. Board of Educ.*, 330 U.S. 1, 15 (1947).

¹⁷⁰ See, e.g., *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203, 210-12 (1948).

¹⁷¹ 374 U.S. 203, 216 (1963).

¹⁷² *Sherbert v. Verner*, 374 U.S. 398 (1963).

¹⁷³ E.g., *United States v. Seeger*, 380 U.S. 163 (1965) (by implication). We do not know

protection of religious freedom need violate the establishment clause. This is so for two reasons.

First, taking persons' religious scruples into account in decisionmaking is not "aid to religion" in any sense contemplated by the establishment clause or by the Supreme Court's interpretation of that clause in any case to date. As already noted, two types of situations are possible in which this "taking account" of religious scruples may result in free exercise protection. In the first, the free exercise clause is deemed to require the judgment that religious interest x must prevail over other interests. In the second, a legislative decision is made that religious interest y , *involving the protection of one or more persons' religious freedom*, shall be allowed to prevail over other interests of legislative concern. This legislative decision can be actualized in one of two ways: the legislature can either decide not to pass a statute at all, perhaps surmising that the particular religious scruple is too widespread to make a statute upholding the competing interest(s) practicable; or it can decide to carve out an exception to required compliance for those whose religious scruples forbid their adherence. (The second alternative is of course a more "visible" means of protecting religious scruples; this does not mean that the first alternative occurs less often.) Regardless of whether a given result deferring to a particular religious scruple is required by the free exercise clause or merely permitted by it, in neither event is religion being treated more favorably than other interests. *Rather, in both cases, the free exercise clause theoretically requires the comparison of the magnitude of the religious freedom interest with other interests, else the free exercise of religion is being slighted.*

The reasoning just offered does not mean that we should interpret the establishment clause to say merely, "Government cannot aid religion any more than it aids other secular interests." Such would indeed conflict with the Court's insistence that aid to all religions does not pass the establishment clause prohibition. Rather, the argument is that government protection of the right to free exercise of religion is no more to be thought of as government "subsidization" than is government protection of free speech. In other words, there is a difference between the state's *subsidizing* religious free exercise, either through nonincidental financial support¹⁷⁴

what the Court would do if it were squarely faced with the question: Does the free exercise clause require that government provide for conscientious objector exemption from combatant military service? For a recent intimation that such a requirement would not be recognized, see *Gillette v. United States*, 401 U.S. 437, 461n.23 (1971) (dictum). For view that under certain circumstances, the free exercise and due process clauses require exemption from compulsory military service, see *United States v. Sisson*, 297 F. Supp. 902, 906-11 (D. Mass. 1919), *appeal dismissed* 399 U.S. 267 (1970). "The chief reason for reaching this conclusion after examining the competing interests is the magnitude of Sisson's interest in not killing in the Vietnam conflict as against the want of magnitude in the country's present need for him to be so employed." 297 F. Supp. at 910.

¹⁷⁴ *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

or other means, such as implicitly sponsoring religious worship,¹⁷⁵ and the state's *protecting* the free exercise of religion as the first amendment clearly requires it to do.

Protecting free exercise of religion does of course cost the state some money in much the same way that protecting free speech costs money (for example, a police escort for a controversial speaker). However, as long as this cost does not become more than "incidental" (admittedly a less than precise term, but not an illusory one either), it is difficult to believe that the establishment clause has been violated.

There sometimes exists the problem of a substantial corollary economic or other advantage accruing to the successful claimant for religious exemption, even when no significant expense is incurred by the government. In the military conscientious objector situation, this problem is partially solved by the requirement of alternative service in a civilian or noncombatant military capacity. The imposition of an "alternative burden" to lessen or offset a comparative windfall resulting from the receipt of free exercise protection may be feasible in other areas as well. The general conclusion with respect to the often observed "tension" between the two religion clauses is this: There are other and better ways to deal with this tension than by the state's simply failing to protect people's interests in "beyond speech" free exercise.

The second reason that taking account of religious (way of life) commitments does not violate the establishment clause is both a reason and an absolute condition for the conclusion that nonestablishment is preserved. It has already been recognized that nonestablishment does not *only* mean that there can be no governmental preference among different religions. However, this recognition should in no way slight the widely accepted understanding that state nonfavoritism among different religions is the taproot of the nonestablishment idea. Therefore, in order to argue that taking account of religious commitments does not violate the establishment clause, one must be using a definition of religion as broad as that argued for in this essay. One cannot use a more restricted definition without discriminating among different religions by virtue of the content of their beliefs.

It is a fair guess that an awareness of the danger of religious discrimination, more than any other factor, was the impetus for those who have advocated an extension of the establishment clause to such a point that the free exercise clause would become superfluous to the other first amendment freedoms. This religious discrimination, however, has more than once been described as discrimination in favor of religious beliefs and against beliefs of conscience. For example, Kurland's discussion of the 1917 draft law contained the following comment:

¹⁷⁵ *E.g.*, *Engel v. Vitale*, 370 U.S. 421 (1962).

The statute did not exempt all whose consciences forbade them to fight. It exempted only those with proper religious allegiances. It may be more difficult for some than it was for Chief Justice White [in the *Selective Draft Law Cases*¹⁷⁶] to see why this classification was not a breach in the high wall of separation.¹⁷⁷

Similar are Justice Harlan's comments in his *Welsh* concurrence, discussed earlier, in which he argued:

The constitutional infirmity [of § 6(j)] cannot be cured, moreover, even by . . . draw[ing] the line between religious and nonreligious. This in my view offends the Establishment Clause. . . .

The common denominator [of those entitled to the exemption from combatant service] must be the intensity of moral conviction with which a belief is held.¹⁷⁸

In other words, all sincere conscientious objectors must be excluded in order to avoid violating the establishment clause. As Justice Harlan himself explicitly recognized, the discrimination favoring "religious" belief over "ethical" or "moral" belief in § 6(j) is fully cured by the *Welsh* plurality's definition of religion. This broad definition of religion would of course have cured Kurland's quoted objection to the 1917 draft law as well. The *Seeger-Welsh* legal definition of religion is clearly broad enough to include the kind of beliefs that Kurland and Justice Harlan describe as being merely ethical or conscientious and thus, in their lexicon, non-religious. The controversy between the *Welsh* plurality and Justice Harlan therefore reduces to a dispute as to proper labeling. If this dispute were merely an academic one, it might well be left alone here. However, there are real-world reasons for concluding with the *Welsh* plurality that what Justice Harlan chose to label as nonreligious ethical belief should be legally understood as religious belief.

First, there is no religiously neutral way to distinguish between beliefs that are purely moral or ethical but not religious and beliefs that are truly religious. First amendment considerations aside, of what use is such a distinction to the legal system, when no one is capable of describing the distinction so as to win the comprehension and assent of the rest of us? It won't do, for example, to say that the belief must have some supernatural ground or content in order for it to be religious. There are groups of persons who unequivocally understand and describe themselves as being fully religious, but who deny that their religion has any supernatural content whatsoever.

Second, and of much weightier import, Justice Harlan's lexicon is a potential dead-end street for the judicial protection of "beyond speech" religious freedom. The dead-end is reached thusly: (1) Justice Harlan, as

¹⁷⁶ 245 U.S. 366 (1918).

¹⁷⁷ P. KURLAND, *supra* note 129, at 38.

¹⁷⁸ *Welsh v. United States*, 398 U.S. 333, 357-58 (1970).

already suggested, defines religion for first amendment purposes as "something less [broad] than mere adherence to ethical or moral beliefs in general or a certain belief such as conscientious objection;"¹⁷⁹ (2) any concession to religious freedom (beyond the scope of free speech, etc.) violates the establishment clause if it does not include those whose scruples are merely conscientious but not religious;¹⁸⁰ (3) (not expressed by Justice Harlan, but fully in accord with his position) since there is no constitutional protection of "beyond speech" free exercise of conscience, no court on its own initiative would be justified in requiring conscientiously grounded exemptions to otherwise constitutionally valid legal norms; (4) since judicial intervention to protect religious freedom *à la step two* would violate nonestablishment, and since any judicially initiated intervention *à la step three* is without specific constitutional authorization, there is simply no judicial protection for freedom of religion or freedom of conscience grounds for exemption from otherwise constitutional legislation. Though the reasoning contained in this conclusion goes somewhat beyond Justice Harlan's explicit statements, the result comports with them:

My own conclusion, to which I still adhere, is that the Free Exercise Clause does not require a State to conform a neutral secular program to the dictates of religious conscience of any group.¹⁸¹

In other words, according to Justice Harlan's dissent in *Sherbert*, courts have no business carving out religious exceptions (or, impliedly, conscientious exceptions) to "neutral secular program[s]" enacted by the legislative branch.¹⁸²

Deviating from a consistent "religion-blindness" position, Justice Harlan does allow for the protection of religious and conscientious scruples if a legislature chooses to carve out an exemption.¹⁸³ (If the exempted group were defined so as to include fewer than all those having conscientious scruples, Justice Harlan would judicially intervene either to broaden the definition of those qualifying for the exemption, as he voted to do in *Welsh*, or else to nullify the exemption, the choice depending on which course would best reflect legislative intent.¹⁸⁴) One ought first to endorse Justice Harlan's willingness to concede to legislatures this role in actualizing religious freedom and his willingness to insure judicially that they extend any such freedom to all persons with the requisite subjective commitment to whatever scruples legislatures decide to protect.

¹⁷⁹ *Id.* at 358-59n. 10.

¹⁸⁰ *Id.* at 357-58 (Harlan, J., concurring).

¹⁸¹ *Id.* at 358n. 9.

¹⁸² It is most unlikely that Justice Harlan would have reached a contrary conclusion as to "a neutral secular program" enacted at the federal level, for the logic of his position applies equally there. He clearly implies its applicability to federal law. *Id.* at 356.

¹⁸³ 374 U.S. at 423 (Harlan, J., dissenting).

¹⁸⁴ See *Welsh v. United States*, 398 U.S. 333, 361-67 (1970) (Harlan, J., concurring).

Hopefully, substantial progress at achieving way-of-life freedom (religious freedom) will result from legislative initiative.¹⁸⁵ However, it would be folly to rely *solely* on the legislative branch to protect the constitutional guarantee of religious freedom. This is so for the same reason that the legislative branch, both state and federal, has proved itself an inadequate protector of the constitutional rights of, for example, freedom of speech, procedural due process, and equal protection. Active judicial vigilance has been (and still is) required to protect the rights of those who lack the political power to demand and win legislative recognition of their interests. The poor record of the legislative branch (and the executive branch as well) for being able to respond to the needs of the deviant and powerless members of our society has required judicial activism. For these people, courageous courts are the last *legal* resort. One can think of no area of human experience in which the tyranny of the majority has been more of a threat to the rights of the minority than in the matter of religion. In religion, even if nowhere else, a constitutionally activist judiciary is needed to protect the rights of the unpopular and eccentric if and when other branches of government fail to do so. It is on this basis that Justice Harlan's approach to the protection of religious freedom must be faulted as less than adequate.

In view of the above, it becomes important to insist that the Supreme Court in *Seeger* and *Welsh* was in fact developing a legal definition of *religion*. Courts and lawyers are prisoners of labels or "magic words," the critiques of the most profound jurisprudential minds notwithstanding. And in the matter at hand, the "magic words," the constitutional label employable in the service of way-of-life freedom, can most readily be found in the first amendment free exercise of religion guarantee. (Note, for example, the superior feasibility of the free exercise clause for protecting way-of-life freedom over the "zones of privacy" approach of *Griswold v. Connecticut*.¹⁸⁶ In the first place, religion is not constricted to the "private" aspects of life. Secondly, the tortuous "penumbras-emanations" judicial gyrations are not needed to arrive at the intended result — the protection of individual prerogatives in the absence of compelling counter interests.)

¹⁸⁵ The legislature's constitutional responsibility for protecting way-of-life freedom is not confined merely to carving out religious-conscientious exceptions to legal norms and simply abstaining from creating legal norms that unnecessarily impede way-of-life freedom generally. The legislature can and should act positively to protect religious-conscientious freedom by protecting the citizenry from physical peril and material deprivation. Assuring adequate food, clothing, shelter, medical care, and healthful living conditions in the context of responsible ecological maintenance serves directly to enhance persons' religious liberty. To the extent people are free from the struggle for material survival, they are free to shape their own lives in the service of whatever God or gods they love.

¹⁸⁶ 381 U.S. 479 (1965). This is not to suggest that one must choose between the two. *Griswold* and the free exercise clause may be viewed as complementary, if partially overlapping, protections.

Freedom of conscience, therefore, ought not be understood as something "outside" the scope of freedom of religion. Freedom of conscience is necessarily included within freedom of religion: there is no way one can define religion (a) in a theologically neutral manner, and (b) in a rational and intelligible way that even minimally takes account of the widespread good faith attempt by scholars to study religion in a descriptive rather than prescriptive manner, without including matters of conscience within one's understanding of the scope of religion. Consider, for example, Brightman's formulation:

Religion is concern about experiences which are regarded as of supreme value; devotion toward a power or powers believed to originate, increase, and conserve these values; and some suitable expression of this concern and devotion, whether through symbolic rites or through other individual and social conduct. Religion, then, is a total experience which includes this concern, this devotion, and this expression.¹⁸⁷

Or Harald Höffding's:

That which expresses the innermost tendency of all religions is the axiom of the conservation of values.¹⁸⁸

Or Abraham Joshua Heschel's:

The root of religion is the question *what to do with* the feeling for the mystery of living. . . . Religion, the end of isolation, begins with a consciousness that something is asked of us. It is in that tense, eternal asking in which the soul is caught and in which man's answer is elicited.¹⁸⁹

The above quoted statements all suggest what is obvious — that religion *includes* matters of conscience. And the first amendment suggests (or, rather, *requires*) this: No content of belief requirement may be *added on* to a sincerely and deeply felt conscientious commitment in order for it to qualify *as religion* so as to receive the same degree of free exercise protection afforded a like commitment claimed to be supernaturally grounded. *All deeply felt conscientious commitments must be included in a constitutionally valid legal definition of religion.*

In arguing for the appropriateness of the *Seeger-Welsh* definition of religion as a tool in actualizing religious freedom for conduct going beyond that of free speech, etc., one does not have to slight the valid concern for "nonestablishment neutrality." Rather, for the reasons discussed above, one can do justice to the free exercise clause *and* to the establishment clause as well. This ought to satisfy the libertarian and religious neutrality concerns of those who have mistakenly sought their realization by advocating a stance of more or less "religion-blindness" on the part of government.

¹⁸⁷ E. S. BRIGHTMAN, *supra* note 56, at 17 (emphasis deleted).

¹⁸⁸ H. HÖFFDING, *THE PHILOSOPHY OF RELIGION* 215 (1906).

¹⁸⁹ A. J. HESCHEL, *MAN IS NOT ALONE: A PHILOSOPHY OF RELIGION* 68-69 (1951). (emphasis supplied).

4. The Current Ambiguity

Perhaps the reader has noticed a continuing ambiguity in this essay. The argument for a "beyond free speech, press, etc.," way-of-life understanding of religious liberty has been presented somewhat as if it were a proposal for the courts to venture forth boldly and break new ground in the realm of individual liberty. This same argument has also (even simultaneously) been presented as a defense of "the law" as it now exists, according to our always final if not always infallible authority, the United States Supreme Court. The justification for both the ambiguity and the discomfort it must cause the careful reader is that the ambiguity correctly reflects the state of the law at the time of this writing.

In 1963, the Supreme Court rejected the Kurlandian religion-blindness interpretation of the first amendment and granted a "beyond speech" scope to the free exercise clause in *Sherbert v. Verner*.¹⁹⁰ In doing so, the Court protected the state unemployment compensation rights of a Seventh-Day Adventist who refused to violate her religious convictions by accepting employment that would have required her to work on her Sabbath. (In addition to *Sherbert*, the Court in *Seeger* and *Welsh* upheld the legislative granting of exemptions from combatant military service for religiously grounded conscientious objectors as a matter of permissible legislative policymaking rather than, as was the case in *Sherbert*, a requirement of the free exercise clause.)

The Supreme Court of California in 1964 reversed the conviction of a group of Navajos for illegal possession of narcotics, holding that this sanction against their use of peyote would violate their right to the free exercise of their religion.¹⁹¹ However, neither the United States District Court nor the Court of Appeals for the Fifth Circuit accepted Dr. Timothy Leary's contention that his prosecution for violations of federal criminal statutes relating to marihuana contravened his free exercise of religion rights.¹⁹²

In 1963, the Supreme Court of Minnesota had initially affirmed Mrs. Owen Jenison's contempt conviction for refusing on religious grounds to serve as a trial juror.¹⁹³ However, upon remand from the United States Supreme Court¹⁹⁴ "for further consideration in light of *Sherbert v. Verner*," the Minnesota court decided that nonspurious religious scruples against serving on a jury must be honored "until and unless further expe-

¹⁹⁰ 374 U.S. 398 (1963). I use the term "beyond speech" to denote religious expression beyond the general (not specifically religious) first amendment free expression guarantees. This "beyond speech" activity would include conduct (acts or omissions) violating civil or criminal legal requirements.

¹⁹¹ *People v. Woody*, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964).

¹⁹² *Leary v. United States*, 383 F.2d 851 (5th Cir. 1967), *rev'd on other grounds*, 395 U.S. 6 (1969).

¹⁹³ *In re Jenison*, 265 Minn. 96, 120 N.W.2d 515 (1963).

¹⁹⁴ *In re Jenison*, 375 U.S. 14 (1963).

rience indicates that the indiscriminate invoking of the First Amendment poses a serious threat to the effective functioning of our jury system."¹⁹⁵

These few instances comprise the most noteworthy applications thus far of the principle that free exercise of religion protection goes beyond freedom of belief, speech, etc. and extends to conduct deviating from legal norms.¹⁹⁶ Contrary to the prior warnings of Justice Frankfurter and others, the Supreme Court's adoption of this principle in 1963 has not resulted in all hell (or very much of heaven either) breaking loose and disrupting the body politic.

There is, however, no reason why the above minor adjustments of legal norms to individual religious scruples need exhaust the meaning of the principle espoused in *Sherbert*. But the existence of an equally possible option for the judiciary must be admitted. Courts could let the *Sherbert* principle die a quiet and slow death simply by failing to apply it in significant situations. Any court, if it wished to do so, is quite capable of distinguishing virtually any other fact situation from the trivial concession made by the law to an unemployment compensation claimant who refused to work on her Sabbath.¹⁹⁷ There are very few matters of state regulation about which no "compelling state interest"¹⁹⁸ could be found or imagined; courts could explicitly or implicitly define "compelling" as anything but the most patently trivial. For example, *Gray v. Gulf, Mobile & Ohio Railroad Co.* held that the payment of union dues and fees under a union shop contract was a sufficiently compelling state interest so as to override an employee's religious scruples against supporting a labor union.¹⁹⁹ Plaintiff, a devout Seventh Day Adventist, understood his faith to forbid his joining

¹⁹⁵ *In re Jenison*, 267 Minn. 136, 137, 125 N.W.2d 588, 589 (1963).

¹⁹⁶ A more noteworthy application has recently occurred in the Amish schooling case, decided after the text here was written; *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (free exercise clause violated by conviction of Amish parents under Wisconsin's compulsory school attendance law in which parents' religious beliefs dictated their refusal to send children past the eighth grade). In negligence cases, religious beliefs have been taken into account sometimes in determining whether conduct conformed to reasonable care, particularly with respect to contributory negligence. See *Lange v. Hoyt*, 114 Conn. 590, 159 A. 575 (1932) (jury entitled to consider plaintiff's conduct in procuring medical care for her injured daughter in the light of plaintiff's belief in Christian Science doctrine).

¹⁹⁷ The *Yoder* case hardly forecloses the option of letting "beyond speech" free exercise protection die a quiet and slow death. Its unique facts are also readily distinguishable from future attempts to invoke its example. See 406 U.S. at 212-13, 216-19, 222-27, 234-36.

¹⁹⁸ 398 U.S. at 403, 406. The "compelling state interest" must be "in the regulation of a subject within the state's constitutional power to regulate." *Id.* at 403. And "[t]he conduct or actions so regulated" must pose "some substantial threat to public safety, peace or order" in order to justify an infringement on free exercise. *Id.* at 403. "[O]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation" of first amendment rights. *Id.* at 406, citing *Thomas v. Collins*, 323 U.S. 516, 530 (1944). And finally, the state must show "that no alternative forms of regulation would combat [the] abuses without infringing First Amendment rights." *Id.* at 407 (footnote omitted). All of these partially overlapping characterizations and requirements in *Sherbert* are subject to a wide spectrum of interpretation. Other courts and the Supreme Court itself are thus quite free to broaden or narrow the effect of *Sherbert* as they are so inclined.

¹⁹⁹ 429 F.2d 1064, 1072 (5th Cir. 1970), cert. denied, 400 U.S. 1001 (1971).

or supporting a group that might make moral decisions in his behalf contrary to his own convictions. He was dismissed from his job for failing to pay union fees and dues, though he had offered to pay equal amounts to a designated charity. Plaintiff is instead paying a high price for the exercise of his religious beliefs, namely, the loss of his job.

The bias of this paper in favor of enhancing religious liberty is one that the reader may or may not find compatible with his own inclinations. However, one point must be acknowledged regardless of one's biases (values) concerning the proper scope of religious liberty: As a society reaches a post-industrial era of super-abundance, it *can afford* (if it wants) to grant each individual more religious freedom *qua* way-of-life freedom. (It thus may not be mere coincidence that judicial decisions granting a "beyond speech" scope to religious freedom are for the most part of relatively recent occurrence.) A society as overflowing in material goods as ours should be able to apply the *Sherbert* principle far beyond the minor but possibly prophetic examples that have already occurred.²⁰⁰ If Kurland's prescription for religion-blindness is "a doctrine in search of authority,"²⁰¹ *Sherbert* is, at this writing, authority in search of broader and more significant application.

As a possible example, imagine that *A* is married, the father of small children, and a competent worker in his job. *A* is intensely devoted to his family and deeply wishes to be able to give them more of himself than what is left over after a long day at his office. *A* would like to work half-time at half his current pay in order to take his "fair share" (as he and his wife, *B*, see it) of the physical and emotional responsibility (and joy!) of raising children and keeping house. *A*, *B*, and the children are willing to adjust their life style in accordance with the reduced income he would earn under such a plan. However, *B* hopes to be able to pursue a part-time career of her own as well. *A* would be willing to work half days or three days a week or six months per year or any other reasonable half-time schedule his employer might prefer. It is not likely that *A* could effectuate such a plan in most employee situations,²⁰² at least not without significant sacrifices in *rate* of pay, tenure, position, chance for advancement, and type of work — deprivations far out of proportion to any economic burden *A*'s way-of-life commitment would cause his employer.

If *A* is a federal, state, or local governmental employee, viable judicial free exercise of religion protection should require that, absent the employ-

²⁰⁰ The pre-*Yoder* applications of *Sherbert* have been "minor" only with respect to the state interests that have been required to yield to religious scruples. These cases were hardly "minor" to the individuals whose religious commitments were at issue.

²⁰¹ P. KURLAND, *supra* note 129, at 16.

²⁰² Cf. *Dewey v. Reynolds Metals Co.*, 429 F.2d 324 (6th Cir. 1970), *aff'd mem.*, 402 U.S. 689 (1971) (equally divided court). Plaintiff's discharge for refusing on religious grounds to comply with his employer's compulsory Sunday overtime schedule was upheld. One can imagine the likely business reaction to *A*'s proposal in the text example.

er's showing of clear unfeasibility, *A* be allowed to retain his employment on a half-time basis—with no loss in *rate* of compensation, rights of tenure, position, etc., not genuinely required by his reduced work schedule. Due to the Supreme Court's narrow view of what constitutes state or governmental action, legislation would in most cases be needed to extend similar protection to employees of our (so-called) "private" corporations. (However, using this essay's legal definition of religion, such protection ought already be deemed to exist by virtue of the Civil Rights Act of 1964's prohibition against religious discrimination by covered employers.²⁰³

If the above example does not appeal to the reader, he is invited to imagine other instances in which secular interests could readily bend to accommodate personal religious (way of life) commitments. This essay deliberately chooses not to attempt a cataloguing of these various possibilities; that task is best done by a diverse array of future claimants themselves. Also, one today has little idea of what social uniformities are apt to be imposed in the future as technological complexity increases and we come into conformity with the needs of the machines we build. Whatever these imposed uniformities may be, basic humaneness will require that the justification for any given norm be balanced against an objecting individual's deeply felt aversion.

Actualization of religious freedom *qua* way-of-life freedom cannot be achieved if we adhere to the norm of governmental religion blindness, either expressly or impliedly.²⁰⁴ Religion blindness would forbid both legislatures and courts from recognizing the constitutional norm of religious freedom beyond the general scope of freedom of inner belief, speech, press, etc. By requiring that religion be made a *legally irrelevant* factor, religion blindness makes the free exercise of religion a *constitutionally irrelevant* dimension of human experience. It is difficult to believe that such a result does justice to the first amendment, which dealt with religious freedom as distinct from, yet related and complementary to, freedom of speech, press, assembly, and petition. Nor does such a result do justice to any teleological dimension in the Constitution—the quest for a society that actualizes the full realm of human dignity. Such dignity cannot be confined to verbal and symbolic expression; its culmination is in what one becomes and what one does. A constitutional government, having human dignity as its philosophical base, will move to guarantee human freedom at the way-of-life (the religious) level. If legislators and judges are to play an effective role in this endeavor, they will need a definitional tool

²⁰³ 42 U.S.C. § 2000e-2(a) (1970).

²⁰⁴ Although this essay, with others, has rejected Kurland's doctrine of religion-blindness, such fact does not imply a lack of appreciation for the value of his contribution to the church and state discussion. By lucidly articulating a novel and internally consistent approach, Kurland has challenged and encouraged others to rethink their own positions and to attempt some doctrinal improvement to explicate and evaluate past authorities (cases) in the area.

like that of *Seeger-Welsh* so that the protection of religious freedom can be effected with the high degree of neutrality that both the free exercise and the nonestablishment clauses require.

B. *Fear of the Broad Scope of Functionally Defined Religion*

1. General Considerations

The *Seeger-Welsh* definition of religion is a "functional" one. It defines religion purely on the basis of what religions do, namely, serve as the objects of people's life commitments. It intentionally avoids any description of the objective content of these commitments. The definition is therefore subject to the criticism that it is simply too broad for the general legal and constitutional use being advocated in this essay. Writing before the *Welsh* decision, Mansfield objected to a purely functional definition:

Is it not . . . true that a belief that no one would dignify as religious may occupy an important if not dominant place in a man's life, profoundly affecting his conduct, thoughts, and feelings? A person may make his pocket-book his master or his stomach a god, or consider that the highest virtue is the preservation of his own life and the advancement of his own interests, but no one would say, except ironically, that because of his devotion to these ends his belief in them is religious.²⁰⁵

Likewise, John Richard Burkholder rejects a purely functional definition and thus "avoids the anomaly of describing a baseball addict as religious."²⁰⁶

In dealing with this line of criticism, it becomes important to ask, What is it that those objecting to a functional definition are trying to avoid? Are they simply reluctant to dignify human commitment to such "gods" as money, appetite, self-preservation or baseball by according to them the religion label, feeling that the term should be reserved for higher concerns? Although I shall return to this as a possible ground of objection, it is more likely that what bothers those who fear a purely functional definition is this: If religion were defined broadly enough to include *any* subjectively intense human commitment, decisionmakers would be flooded with free exercise of religion claims in every conceivable sphere of the law. This would have the effect of either (a) so deadening the judicial ear to free exercise claims that courts would be unable to hear a bona fide spiritually based claim when one was offered or (b) bringing about the general breakdown of social control that Justice Frankfurter and others feared if individual consciences were required to be taken into account in determining legal duties. The fear of such possible outcomes has some

²⁰⁵ Mansfield, *supra* note 26, at 10.

²⁰⁶ Burkholder, *Religion in the First Amendment: A Social Theory Approach to Constitutional Interpretation* 206 (1969) (Ph.D. dissertation, Harvard University). See also *id.* at 162.

validity, particularly in the area of economic regulation. One can imagine the slumlord who asserts that running slums is his religion and that any legal demands on him to improve the living conditions of his tenants would violate his sphere of free exercise. Though the *fear* is a valid one, the danger behind the fear can be alleviated without having to posit a narrower and therefore constitutionally invalid definition of religion.

In the first place, recognizing that the above danger does exist ought not to encourage us to exaggerate its dimensions. There are a number of human beings in our society who are not going to be willing to identify themselves as *religiously committed* to making money or watching baseball or lording over slums. To make a free-exercise-of-religion claim under a *Seeger-Welsh* type test, one must meet whatever requisite degree of subjective commitment is required for exemption from the particular legal duty in question. (As argued earlier, the subjective intensity requirement should vary according to the magnitude of the secular interest at stake. And some secular interests are too great to allow for any exemption.) To make even a *prima facie* free-exercise-of-religion claim with respect to a law that is abridging his moneymaking, slum lording or baseball watching, one must either allege that moneymaking, slum lording or baseball functions in his life analogously to that of God in the life of an orthodox believer, that is, that moneymaking, etc., is the ultimate source of meaning for his life, or, in the alternative, allege that moneymaking, etc., is such an integral expression of what he regards as "divine" (of ultimate importance to him) that he is religiously committed to its practice as constituting all or some part of his free exercise of religion.²⁰⁷

One does not have to make an unduly optimistic assessment of humanity to predict that not everyone would be willing, in what would amount to a public profession of one's religious faith, to categorize himself in any such way as these. This prediction evidences a greater probability of correctness when one asks: How many people will be willing to so portray themselves after a number of such claims have failed to override compelling secular needs, such as the health and safety of others? The problem of bizarreness thus partially solves itself; the more implausible that a concern could be thought of by the rest of us as religious, the more unlikely that there will be very many persons willing to make the claim.

The above argument, of course, leaves unresolved whatever danger of "court-flooding"²⁰⁸ and/or "social chaos" in the economic sphere might be posed by those (many or few) of us who would be quite willing to wear any religious label in order to get what we want in the marketplace.²⁰⁹ Regarding this problem, it should first be recognized that there

²⁰⁷ One should of course not be obliged to use the term "religion" in his allegation. Any term or terms functionally equivalent to the idea of deep personal commitment should suffice.

²⁰⁸ "Trickling" is apt to convey a more accurate image than "flooding."

²⁰⁹ Though not particularly relevant to the matter under discussion, there could be a salu-

is no separating religion from economics any more than there is separating religion from any other aspect of human behavior. There are valid freedom of religion claims which directly clash with the society's economic values. And because a free exercise claim may benefit the claimant economically, it does not follow that his claim is ipso facto insincere or irreligious. The subjective commitment requirement as such should not weigh more heavily upon one whose religious interest happens to be mixed in with his economic well-being.²¹⁰ And the approach being taken in this paper, which views genuine freedom of choice in religion as a highly preferred value, would allow one to make a free exercise claim that directly or indirectly, explicitly or implicitly, involved one's economic livelihood. One should be free to make his work his religion and to expect as much constitutional protection for its free exercise as one would get from being a Methodist or a Zen Buddhist.

The just stated goal can be realized without the "court-flooding" or social chaos mistakenly feared if a functional definition of religion were generally employed. The way to actualize genuine religious freedom (way-of-life freedom), neutrally defined, *and* at the same time protect equally deserving secular interests is *not* by restricting the definition of what constitutes religion. Instead, courts can protect against "court-flooding" and against social chaos in the very same way that the Supreme Court in the past has protected against these evils with respect to more traditionally defined religion; courts can simply continue to uphold the firmly entrenched view that the free exercise of religion guarantee is not absolute when overt acts or refusals to act threaten compelling state interests. This rule of law, applied, for example, in *Reynolds* and probably "over-applied" in *Prince v. Massachusetts*, was carried forward in the *Sherbert v. Verner* opinion. The Court in *Sherbert* was careful to indicate that, though religious scruples could now, under certain circumstances, require immunity from a legal duty, this more or less new development in actualizing constitutional religious freedom did not mean that religious concerns would override compelling secular ones:

[We do not,] by our decision today, declare the existence of a constitutional right to unemployment benefits on the part of all persons whose religious convictions are the cause of their unemployment. This is not a case

tary by-product in such religious candor. Both the individuals involved and the society might benefit from persons' publicly confessing their (our) commitments, whether they be gaining wealth or whatever. Concrete applications are left to the reader's own imagination.

²¹⁰ This does not mean that economic gain would be irrelevant in determining subjective intensity. Where strong subjective commitment was required to excuse certain otherwise illegal behavior, the following possibility is conceivable: X seeks immunity for activity Y, alleging religious grounds. The only value to which X shows sufficient intensity of commitment is wealth accumulation. X would qualify for possible religious exemption only if his expressly alleged religious basis consisted of or included moneymaking as its object of ultimate concern.

in which an employee's religious convictions serve to make him a nonproductive member of society.²¹¹

As suggested earlier, the question of what secular needs are sufficiently compelling so as to justify abridgment of the free exercise of religion is one upon which persons will certainly differ. Even the situation alluded to by the Court, when someone refuses to work for religious reasons and seeks governmental subsistence, is not a crystal clear case for denial of the religious claim, though without added facts most of us would be inclined to deny it. But *quaere*, is the work which that person is required to do in lieu of being unemployed necessary? Is it to polish the brass rail in a luxury hotel? Or is it to collect refuse that would otherwise present a health problem? The competing state interests in the refuse collection hypothetical is a bit more convincing than in the brass rail situation. It is of course a respectable position to argue that any religious grounds for refusal to work at all must be routinely denied as a basis of entitlement to state subsistence for the unemployed, lest a Pandora's box be opened such that masses of persons might decide to become "religiously unemployed" and become an economic burden on the rest of us. Such a position is undercut, however, at least to the extent that the problem of "creating work" becomes more and more contrived as technology continues to replace necessary human labor. However, the Pandora's box argument would seem to have a longer life expectancy in the matter of religious objection to the payment of taxes (for example, due to religious-conscientious objection to the government's use of the proceeds to kill people in Southeast Asia). In the tax area, it is a particularly convincing argument that exemptions for religious or conscientious scruples would be generally unworkable because of the effect such a program would have on the compelling need of government to be financed.²¹² In other words, the allegation that allowing such exemptions would wreak havoc on the taxation process is probably true. (This a mild way of saying that we hold money as much too precious a thing to be able to allow such a tempting form of religious free exercise as conscientious exemption from taxation.)

Regardless of where one draws the "compelling state interest" line, the point is clear enough; one *can* protect such valid interests as economic sustenance, health, safety, and ecological preservation (including the right to reasonable peace and quiet) without having to narrow the scope of *what is religion* in the first amendment. One protects these other human interests simply by refusing to allow the free exercise of religion to run

²¹¹ *Sherbert v. Verner*, 374 U.S. 398, 409-10 (1963).

²¹² Even here exceptions are possible. See Mansfield, *supra* note 26, at 54-56, for a discussion of the exemption from social security tax for members of "a recognized religious sect" conscientiously opposed to insurance, when the sect itself provides for the risks covered by the Social Security System. See also INT. REV. CODE of 1954, § 1402(h). This exemption, passed in 1965 largely through the efforts of Senator Joseph Clark of Pennsylvania, was adopted with the Amish in mind.

over them, not by concluding that subjectively committed religious claimants are "not religious" (or "not conscientious") because the objects of their commitments are "beneath" the religious standards most persons purport to hold.

Therefore, the moneylover, the baseball lover, or the self-lover should get the same protection given the Orthodox Jew or the Southern Baptist or the Roman Catholic. All of these persons, for example, should (by virtue of *Sherbert*) be able to refuse to work on a given day of the week without having to forfeit unemployment benefits that would otherwise be available to them. This should be so, provided each is willing to make a *prima facie* allegation of their religious or conscientious objection to working on that day, and provided each can satisfy factually whatever degree of subjective commitment to their stance is deemed to be required. The same is true with respect to § 6(j) exemption from compulsory military service, as interpreted by *Seeger-Welsh*. Likewise as to any free exercise exemption from military service that a court might deem to be constitutionally required, even in the absence of legislative recognition. And likewise as to any other legislative or judicial concessions to free exercise of religion, as nearly as is reasonably possible. (One must posit the ideal without expecting its perfect realization.) In other words, *all* grounds of personal commitment should be treated equally in the sense of being legally recognizable as aspects of religion or conscience if persons claim them to be so and can show the requisite adherence.

At the same time, neither moneylover *qua* moneylover nor orthodox Christian *qua* orthodox Christian should be able to pollute the environment or evade taxes²¹³ or lord slums contrary to otherwise constitutionally valid legal norms. Thus, *any "discrimination" in governmental treatment is to be based solely on the overt act in question vis-à-vis its effect on secularly cognizable interests*. As long as this "discrimination" fulfills the

²¹³ The reference here is to the attempt to avoid tax liability by virtue of a religious-conscientious objection to the tax or to its use. Tax exemptions to religious groups in the context of a broad legislative scheme of granting exemptions to varied types of nonprofit organizations raise quite different problems. Such tax exemptions, in contemporary times, are not primarily grounded in a conscientious opposition to the support of government on the part of the exempt organizations. Rather, they represent legislative policy that, ideally stated, seeks to encourage a wide variety of nonprofit nongovernmental entities serving a broad spectrum of human needs. First amendment religion clause problems do exist when, in a tax exemption scheme, organizations traditionally understood as religions are: (1) favored vis-à-vis a wide spectrum of other nonprofit organizations; (2) discriminated against vis-à-vis a wide spectrum of other nonprofit organizations; or, more dramatically, (3) excluded *in toto* from an otherwise broad program of exemptions for "nonreligious" nonprofit entities. A system of tax exemptions best reflects the first amendment when it focuses on religiously neutral qualifying criteria, *e.g.*, genuineness of nonprofit status (reasonableness of compensation to top managerial personnel, etc.). If it is not already the case, it soon will be that legislative policy in fostering a panoply of nonprofit entities is suffering a crisis of acute success. A nondiscriminatory tax on all such entities at some fraction of the rates imposed on residences and profit-making businesses is going to be a necessary corrective. Some socially conscious churches, synagogues, and other organizations are now making such payments on a voluntary basis.

usual due process requirements of a rational secular basis, and no covert religious discrimination is intended, no cognizable free exercise or establishment clause violation would appear to exist.²¹⁴

What is here submitted as the basis for protecting the secular (and religious) rights of others from the individual's own free exercise prerogatives is much akin to Weiss' distinction between public and private spheres discussed earlier. Only when one's free exercise activity goes outside the private-symbolic-belief sphere must it be curtailed in deference to the rights of others. (This essay differs from Weiss' position in its insistence that even in the public sphere, religious rights ought not be treated as *ipso facto* subordinate to secular ones.)

In curtailing free exercise that unduly affects the rights of others, the advantage of using a "public sphere" or "compelling state interest" approach rather than an approach that restricts what is deemed religion according to content of belief is clear; the former approach avoids government's doing what it is without competence to do. It avoids government's prescribing what range of beliefs are "high enough," "noble enough," "spiritual enough" or "good enough" to be deemed religious or conscientious. The former approach does allow government to do the one thing it ought to be competent to do—adjudicate between and among competing, secularly cognizable interests.

By virtue of the free exercise clause, religious and conscientious commitments are also "secularly cognizable" interests. But government is not competent to discriminate with respect to such commitments except on the basis of differences in degrees of subjective commitment and the secularly cognizable effects of overt behavior, but not the effects on what Weiss calls the private belief sphere. However, even the governmental task of adjudicating between secularly cognizable interests has profound religious consequences, the establishment clause notwithstanding. A brief look at this problem occurs later in this essay.

2. The "Religious Wet Blanket" Problem

In trying to surmise the grounds for objection to a purely functional definition of religion, it was earlier suggested that persons may well be reluctant to dignify what they deem to be profane, crass, absurd or ridiculous. One suspects that there is more than personal aesthetic concern in this reluctance. What is very likely at stake is a practical objection to the broadness of the *Seeger-Welsh* understanding of religion. If we insist that religious freedom and nonestablishment require too broad a definition of religion, we risk throwing a "religious wet blanket" upon even the present inclination (which is already weak enough) of legisla-

²¹⁴ Concerning the relationship between the establishment clause and "secular" policymaking, see textual discussion accompanying notes 268-80 *infra*.

tures and courts to grant religious-conscientious exemptions from otherwise compulsory legal norms. Though this concern does not tend to be acknowledged explicitly, it is difficult to believe that it does not enter into the thinking of those who cherish the constitutional value of genuine religious freedom, but who are well aware that by asking for too much, they may wind up with nothing; hence (in part) the prevalent tendency amongst those writers in the "church and state" area who are daring enough to risk attempting a definition of religion at all. Their proposals in one way or another are apt to include some restriction as to allowable content in order for a belief to qualify as a religious one. The following examples illustrate these restrictions on content.

John Mansfield's objection to a purely functional definition has already been noted. His proposal for a definition of religion is as follows:

Religion cannot be satisfactorily defined merely by reference to the role that a belief plays in the life of the believer. To some extent the idea of religion depends on the nature of the questions to which the belief provides an answer and the fundamental character of the realities that the believer asserts. At the least one must say of religion that it directs itself to those basic and universal questions that concern man's origin, destiny, and the purpose of his existence.²¹⁵

One initial response to Mansfield's definition is to ask what is meant by "those basic and universal questions that concern man's origin." Are these questions "universal" in that *all* persons ask them? Or would most persons be sufficient? And do all (or most) persons ask them in essentially the same way? If all that Mansfield is suggesting here is that all persons explicitly or implicitly ask what commitments are important in their lives, there is no objection. Such a "universal question" is the underlying assumption of the *Seeger-Welsh* view of religion. However, the formulation of a universal religious question is permissible state behavior under the first amendment *only if the formulation of the question in no way limits the content of the answer*. Although he does not offer his own proposal for formulating these "universal questions," Mansfield clearly wants them phrased in a way such that they will preclude such answers as one's pocketbook, his stomach, or self-preservation.²¹⁶ For the state to limit the range of answers it will legally recognize as constituting religion by making a legal determination itself as to what are the basic questions of "man's origin, destiny, and the purpose of his existence" is to violate the first amendment. Not even by as plausible a means as this is the state competent to pick and choose among individuals' deeply felt grounds for their deviance from legal norms—not if genuine nonestablishment of religion and free exercise are accorded their due.

²¹⁵ Mansfield, *supra* note 26, at 33-34.

²¹⁶ *Id.* at 9-10.

There is also a related problem in defining "conscientious." Whenever his religious beliefs conflict with a legal norm, a problem of conscience confronts an individual. In other words, the individual must decide which is the greater good—to obey the law or to follow his own religious commitment. Thus, a free-exercise-of-religion claim asserted as an immunity to a particular legal requirement is always a matter of "conscientious objection" as well. This presents a tempting vehicle for introducing a restriction on the allowable objective content of beliefs in order for them to qualify for free exercise exemption from legal norms. Despite its speciousness, the argument could be hypothetically posed as follows:

We concede that the first amendment forbids a definition of *religion* that is restricted as to allowable content. But we are not prescribing content for a legal definition of religion. Therefore we are not violating the first amendment religion clauses. Rather, we are merely legally defining the objective content of *conscientious* beliefs. We can do that in order to administer the (legislative or judicial) requirement that any objection to the particular legal norm being resisted be a "conscientious" *as well as* a "religiously grounded" one.

Before commenting directly on this argumentation, it should be noted that the same general tendency exists with respect to attempts at defining "conscientious belief" as exists with respect to defining "religious belief." The tendency is to try to limit the allowable range of a belief's objective content to "higher" concerns in order for the belief to qualify as, in this case, conscientious or, in the other case, religious. Consider, in this respect, Mansfield's explication of conscientious objection:

There are certain forms of opposition to participation in war that it would occur to no one to characterize as conscientious. Thus some persons are opposed to participation in war because they are afraid they will be killed or wounded or because they find army life unpleasant. Others object because they must leave their families and private affairs. These objections do not rank as conscientious primarily because they are not founded on any notion of superior obligation or duty. It would not occur to most persons with feelings of this sort to dignify them by claiming that they are grounded in a sense of obligation. If a man says that his highest obligation is to save his own skin or to pursue his own interests, he is probably joking. Even if he is not, he will have difficulty in finding support for a description of his position as one involving a superior obligation. A philosophy that gives to self-interest and self-preservation the first place, or a philosophy of hedonism or crude materialism, can furnish little footing for the notion of duty or obligation that lies at the heart of the idea of conscientious objection.

For objection to be conscientious, more perhaps is required than that the objection be based on a sense of duty or obligation. The duty or obligation must be rooted in a belief about fundamental realities and the nature and purpose of human existence. Only an obligation arising out of a belief relating to such fundamentals is ordinarily thought of as "a matter of conscience." Obligations deriving from more modest sources are not

matters of conscience, although they may be obligations in some sense. To engage in military activities would, the conscientious objector believes, violate a duty that derives from a fundamental order of reality as he understands it.²¹⁷

The similarity between Mansfield's definition of *religion*, quoted earlier, and his definition of *conscientious* objection, just quoted, is both striking and in accord with many persons' understanding of each term. Mansfield clearly does *not* subscribe to the strained view that, though a limitation on the term religion based on the content of belief is unconstitutional, such a limitation is permissible in defining conscientious objection. His position is internally consistent in that he accedes to an objective content limitation with respect to both terms. Mansfield's definition of "conscientious" was presented here to show how closely it approximates his definition of religion and thus to suggest the following conclusion: It would be sheer nonsense to take the position earlier referred to, namely, that one can avoid impermissible religious discrimination by discriminating with respect to one's definition of conscientious. As with religious belief, the *only* permissible discrimination concerning the "object" of a conscientious objection is with respect to the external behavior in question. In other words, the state is only competent to ask: What legally required behavior is *A* objecting to and must or ought we honor objections *to that kind of external behavior*? But, except with respect to the existence and degree of the individual's subjective commitment, the state cannot constitutionally inquire as to what grounds of personal commitments are worthy of treatment by the state as truly conscientious ones. The equivalence of asking that and inquiring into the content of beliefs to see if they meet the state's view of what is religion should be obvious.²¹⁸ Thus, the state cannot apply Mansfield's definition of conscientious without itself determining what grounds constitute a "superior obligation or duty." Genuine religious freedom and nonestablishment require that this determination be made by individuals for themselves, and likewise as to the determination of whether the duty "derives from a fundamental order of reality."

Probably the underlying dynamic in attempts at reading more content into the term conscientious than mere sincerity and intensity of commitment is this: Such attempts seek to limit conscientious behavior to situations in which persons purportedly are acting from relatively "altruistic" or "unselfish" motives. However relevant one thinks a selfish versus unselfish delineation might be, the theoretical and practical barriers to mak-

²¹⁷ *Id.* at 29.

²¹⁸ See Mansfield's excellent discussion of the lack of justification for trying to posit a legal distinction between religiously grounded objectors and "nonreligious conscientious objectors." *Id.* at 28-35, 67-68. "[A]ny distinction between the two forms of objection is highly debatable and largely a matter of degree." *Id.* at 76.

ing such a distinction are simply insurmountable.²¹⁹ When does a person act unselfishly? When are his motives free from self-enhancement? (And by *whose* standards would we purport to ascertain "self-enhancement," *his* or *ours*?) It is impossible for us to judge our own motives on any such altruistic scale. To think that we could evaluate someone else's is sheer fantasy.²²⁰ It would therefore introduce both greater rationality and empirical humility into the conscientious/religious scruples arena to confine ourselves to what we might have some chance of grossly assessing—the degree of aversion persons have to complying with a particular exemptible legal norm.

Returning to the constitutional equivalence of limiting what can be conscientious belief with limiting what can be religious belief, it appears that in the process of drafting the first amendment, freedom of religion and freedom of conscience were either deemed synonymous or else so intertwined as to be indistinguishable. Thus Madison spoke of Congress' not being able to "compel men to worship God in any manner contrary to their conscience."²²¹ More on point for present consideration, if one purports to limit the definition of conscience according to the object of belief, the functional effect on "beyond speech" free exercise of religion is exactly the same as so limiting one's definition of religion. Such a verbal finesse ought not serve to undermine the religious neutrality required by both first amendment religion clauses. Yet, the tendency for us to apply our own notions of what kinds of stances are "truly conscientious" is apt to spill over into the formulation of a legal definition.

Consider, for example, the opinion of Judge Augustus N. Hand in *United States v. Kauten*.²²² Judge Hand rightly perceived that "a compelling voice of conscience" should be regarded as a "religious impulse" in granting religiously grounded conscientious objector exemptions under the Selective Training and Service Act of 1940. However, the opinion failed to maintain its nondiscriminatory stance in its apparent conclusion (not clearly enunciated) that a belief can neither be religious nor conscientious unless: (1) its basis goes beyond reason or logic; and (2) it "categorically requires the believer to disregard elementary self-interest and to accept

²¹⁹ Cf. the earlier discussion on this impracticality with respect to § 6(j) religious beliefs in the text following note 65 *supra*.

²²⁰ Even if we could make such an evaluation, it would be of dubious utility. Do we, for example, really care whether those suffering severe and sometimes permanent emotional damage from their past combat experiences are enduring the affects of (a) prolonged and intense anxiety concerning their own safety or (b) intense guilt from having to inflict grievous harm on others? Wouldn't we be equally interested in preventing such results in either "pure" type case (if such purity of "base" or "noble" motives should ever exist)? Concerning the psychological effects of combat, see generally R. GRINKER & J. SPIEGEL, *MEN UNDER STRESS* (1945); E. GINZBERG & ASSOCIATES, *THE INEFFECTIVE SOLDIER* (3 vols. 1959).

²²¹ A. STOKES & L. PFEFFER, *CHURCH AND STATE IN THE UNITED STATES* 92-100 (rev. ed. 1964).

²²² 133 F.2d 703 (2d Cir. 1943).

martyrdom in preference to transgressing its tenets.”²²³ (Note that if the court had only so limited “conscientious” the outcome would have been identical to its actual outcome of its limiting both “conscientious” and “religious”; in neither case would the defendant have qualified for conscientious objector status.)

Even Justice Harlan, so vigilant against discrimination among religions and against discrimination in favor of religion over what he regarded (contrary to this essay) as “nonreligious” conscientious objection, may have lowered his guard as to discrimination among consciences. In concurring with the operative effect of the *Welsh* plurality’s delineation of who is entitled to a § 6(j) exemption, Justice Harlan observed that the delineation does not “create an Establishment Clause problem in that it exempts all sincere objectors but does not exempt others, *e.g.*, those who object to war on pragmatic grounds and contend that pragmatism is their creed.”²²⁴ If all Justice Harlan meant here was that he concurred in the delineative effect of the *Welsh* plurality’s definition with respect to its excluding those not sincerely committed to their objection to war, then this essay fully agrees with his statement. What casts doubt on this interpretation is that, in his example, the individual honestly presented his “pragmatic grounds” as his creed. Therefore, if this hypothetical individual were sufficiently committed to the pragmatic grounds he asserted as a basis for his conscientious objection to all wars, he hardly deserves exclusion because he is insincere. He can only be excluded if the state wishes to purport to delineate what is a conscientious belief according to the content of the belief. Faithfulness to freedom of religion and nonestablishment would preclude such governmental action.

Continuing the consideration of various church and state commentators’ proposals for a legal definition of religion (and, in some cases, for a definition of conscience), we view the formulation of John Burkholder:

Religion is the expression in human action of belief-attitudes of *commitment to that which is conceived as ultimate in a nonempirical sense*; these expressions are symbolized in cultural patterns, institutionalized in society, and internalized in personalities.²²⁵

For our purposes, the key component of this definition of religion is its requirement that the object of one’s commitment be “that which is conceived as ultimate *in a nonempirical sense*.”²²⁶ In positing this requirement, Burkholder purposefully incorporates Talcott Parsons’ distinction between the empirical and nonempirical that, when applied by Parsons to “evaluative beliefs,” becomes a distinction between “ideology” and “reli-

²²³ *Id.* at 708.

²²⁴ *Welsh v. United States*, 398 U.S. 333, 359n. 10 (1970).

²²⁵ Burkholder, *supra* note 206, at 208 (emphasis supplied).

²²⁶ *Id.* (emphasis supplied).

gion."²²⁷ An appropriate response to the "nonempirical" requirement in Burkholder's definition is to note what a philosophical hornet's nest one enters when attempting to divide phenomena into empirical versus non-empirical. Even if one were willing to assume the likelihood of describing a demarcation between these two concepts that most or all of us could understand and accept, the constitutional question would still remain. How can this "conceived as ultimate in a nonempirical sense" requirement be squared with religious freedom or nonestablishment? Why not go further and restrict religion to that involving the supernatural? Or to belief in the God of somebody's understanding of classical theism? The difference between these requisites and Burkholder's definition is merely one of degree, not of principle. They all require the government to decide what can be deemed religion on the basis of the content of a belief.

Jonathan Weiss' aversion to governmental delineation of the bounds of religion was discussed earlier. Except for this essay's advocacy of a variable subjective intensity requirement, Weiss' aversion is shared here. However, at one point Weiss appears to require a legal definition of sorts. He writes:

To make a common sense decision whether a movement is a religion and a claim clearly religious, we look in general to: (a) whether the movement claims through an asking for assent (a rigorous proof of religion would probably refer to grounds of assent); (b) "supernatural" claims traditionally connected with religion; (c) whether the traditional customary activities and trappings of "religion" are present. These forms of representation may be classed as "religious," even if not explicitly held out as related to faith, because they are easily recognizable by the person represented to as associated with such a form of assent.²²⁸

As indicated in the last sentence, Weiss finds it necessary (or desirable) to posit these guideposts for our recognizing religion when, for one reason or another, a person has not expressly represented his stance as such. In other words, these three objective guideposts serve as a functional synonym for behavior not subjectively labeled as religious.

The need for a functional synonym for the term religion is not to be doubted. The objection here is to the particular content of the synonym Weiss chooses. To begin with, it is not clear whether all three components are required for behavior to be deemed religious when not explicitly so designated. It is strongly implied that, at the very least, in addition to Weiss' component (a), which appears always to be required, either component (b) or (c) must also be present unless the claimant explicitly characterized his representation as a religious one. But even this latter reading calls forth a constitutionally based objection: Why should behavior not explicitly labeled as religious be unable (or, if this is Weiss'

²²⁷ See T. PARSONS, *THE SOCIAL SYSTEM* 326-83 (1951).

²²⁸ Weiss, *supra* note 104, at 606.

intent, be less likely) to receive legal recognition as religious if the person's stance lacks either a "'supernatural' claim traditionally connected with religion" or "the traditional customary activities and trappings of 'religion' "?

The impermissibility of the supernatural requirement is clear. The defect is not corrected by Weiss' limiting the supernatural component to instances in which persons' stances are not explicitly self-designated as religious. Any system of definitional guideposts that serves to skew decision-makers' findings of religious behavior toward behavior purporting to involve the supernatural is subject to this objection: Where it results in supernaturally grounded beliefs being exempt from legal norms in preference to other equally devout beliefs, it violates the establishment clause and may violate the free exercise clause as well.

In actualizing the first amendment religion clauses, courts should guard against confining religion to any sort of "other-worldly" box, thereby conveying most or all of social reality in "this world" to the state. Hence one must object to Weiss' tentative formulation that "religious action is action the function of which is *only* to establish and perpetuate a private meaning for individuals—a meaning given to it by a religion."²²⁹ Religious action *qua* religious action may well have secular, physical consequences, even in that transient veil of tears known as the secular world. That giant we call the state neither needs nor deserves to be handed the bulk of social reality by limiting manifestations of religion or individual conscience to matters supernatural or private. The seemingly eternal problems of church and state are always subject to this easy (and totally one-sided) solution. Such an outcome would do justice neither to the state nor to the soul of man. (The tendency toward extreme state favoritism is presented as only that. It is in no way meant to describe the actual position of any commentator here discussed, least of all Weiss himself, who is explicitly aware of the danger of statism.²³⁰)

Regarding the alternative requirement or guidepost (c), "whether the traditional customary activities and trappings of 'religion' are present," one must make two objections. First, such a guidepost doesn't really guide us. What are these customary trappings? Snake handling? Hallucinogenic drugs? Walking on hot coals? The "traditional activities" of religion are as varied as human cultures and individuals. Which "trappings" do we use as the basis of our comparison? The ones in our predominant religions? Establishment clause problems aside, what kinds of activities are similar enough to the Sacraments of Holy Communion and Baptism to qualify them for inclusion within the "traditional activities and trappings" category? The other objection is that even if this guidepost could function

²²⁹ *Id.* at 608 (emphasis in original).

²³⁰ See, e.g., *id.* at 604.

as an intelligible standard, its use "would tend to prejudice recognition of novel or strange institutions of religion,"²³¹ thus hampering the goals of religious freedom and nonestablishment.

In *Washington Ethical Society v. District of Columbia*,²³² the court was faced with an appeal from the District of Columbia Tax Court, which had denied petitioner a church-or-religious-society property tax exemption on the ground that the petitioner society did not believe in or teach "the existence of a Divinity." The court of appeals quite rightly reversed, holding that petitioner was entitled to the exemption. However, a portion of the opinion is troublesome in that the court felt it relevant to demonstrate the extent to which the petitioner society's activities included those "familiar in services of many formal or traditional church organizations."²³³ Far more appropriate was the additional reasoning in then Circuit Judge Burger's opinion that "also included [in addition to religions believing in a divine or supernatural power] in these [standard] definitions [of religion] is the idea of 'devotion to some principle; strict fidelity or faithfulness; conscientiousness, pious affecting or attachment.'"²³⁴ These just-quoted formulations closely resemble the pure subjective commitment test being recommended in this essay as the preferred interpretation of *Seeger-Welsh*. They suggest the constitutionally compelling reason for not restricting religious property tax exemptions according to the objective content of the recipients' belief; to allow such a restriction would put government in the utterly inappropriate position of determining that even though persons may be religiously committed to certain beliefs, those beliefs are not, according to the government, religious.

Concerning Weiss' requirement or guidepost (a), the "assent" component, the proper response depends on what he means. If he is merely saying that religious commitment requires some kind of belief, there is no problem. This "requirement" would add nothing to a purely subjective commitment test. If, however, he intends to restrict religious belief to beliefs grounded in any prescribed way or ways (thus introducing some epistemological requisite), the objection is the same as for any restriction on the content of belief, for content of belief necessarily includes the ground or grounds for belief.

Weiss' formula for a functional synonym for religious behavior is, of course, much less objectionable than it would have been if he had treated it as always required rather than as only advisable when the party himself has failed to identify his stance explicitly as a religious one. Much

²³¹ Boyan, *Defining Religion in Operational and Institutional Terms*, 116 U. PA. L. REV. 479, 494 (1968).

²³² 249 F.2d 127 (D.C. Cir. 1957).

²³³ *Id.* at 128.

²³⁴ *Id.* at 129.

of the criticism stated here is directed against such a potential misuse of Weiss' endeavor.

Also, Weiss was speaking in the context of the question of when a "misrepresentation" would be protected as a religious one. The problem is essentially the same as was discussed earlier in this essay as an instance of when a subjective intensity test would probably not be required.²³⁵ In the matter of whether *A* misled *B* so as to incur legal liability, criminal or civil, it is relevant to ask, "In what mode was *A* purporting to speak?" It might well make a difference that *A* was purporting to speak with medical or scientific expertise rather than purporting to speak purely on the basis of personal convictions. However, even a representation made purely on this latter basis ought not necessarily be free from liability. If *A* unconditionally promised *B* a cure from disease, knowing that he could not guarantee such a result, and *B* was thereby defrauded of wealth and deterred from seeking medical advice, one is led to argue that one or more "public" interests have been violated, even if *A* purported only to speak via his religious beliefs. In such a case, conflicting interests should be weighed against the free-exercise-of-religion interest of *A*, however *A* characterizes his stance.

Whatever rubrics one finally adopts in the utterly perplexing area of religious misrepresentation, Weiss' three-pronged supplement to an explicit religious self-designation has no applicability elsewhere, either in actualizing free exercise or in balancing religious freedom against other worthy concerns. (It is likely that he did not intend its use in areas other than misrepresentation. Thus, again, the objection here is to the potential misuse of his formulation.) The functional synonym for religion Weiss rightly sought can be generally achieved so as also to adhere to the values of religious liberty, state nonestablishment, and fairness to the interests of others. These goals can all be fostered by using the *Seeger-Welsh* definition as that functional synonym, with a subjective intensity requirement that varies with the import of whatever interests happen to conflict with the individual's asserted religious-conscientious commitment.

Stephen Boyan has proposed a five-point legal definition of religion in an "operational" sense:

[R]eligion is a belief which:

- (1) is based not entirely on reason or empirical evidence;
- (2) refers to a final or ultimate reality;
- (3) relates the believer to his fellow men and the universe;
- (4) finds expression in an attitude of veneration or devotion towards the final reality;
- (5) finds expression in an inward mentor called conscience.²³⁶

²³⁵ See text accompanying notes 98-100 *supra*.

²³⁶ Boyan, *supra* note 231, at 486. Boyan supplements his "operational" definition with an "institutional" definition: "a religious institution, or a religion in an institutional sense, con-

Boyan's first requisite reflects an idea found both in the *Kauten* case, already discussed, and in *Berman v. United States*.²³⁷ To say that a belief cannot be religious unless it is "based not entirely on reason or empirical evidence" may or may not deserve assent as a theological claim. But it clearly has no place in a legal definition of religion. Boyan expressly asserts that this first characteristic of religious belief "can be identified as such by the outside observer."²³⁸ If this characteristic were adopted as a legal requisite of religious belief, then the state would assume the utterly dubious function of determining if beliefs were supra-reasonable enough or (or is it "and"?) supra-empirical enough to be religious.

Although the following comment has no applicability to Boyan's own position, it must be noted that the distinction between a belief's having to be "beyond" reason to be religious and its having to be *unreasonable* is not one that offers us much assurance of being clear on all occasions. Requiring persons to think more (or less?) than "reason" is able to think or to see what empirical observation cannot see can readily degenerate into a kind of "weirdo requirement" in the state's legal definition of religion. In other words, from the point of view of secular, this-worldly courts or other state functionaries, a person must be sufficiently "out of it" (from a secular, this-worldly view) in order to receive whatever concessions are made to the religious. If one is out of touch with secular reality and is also deemed dangerous to other interests, the state civilly commits him for safe-keeping in an institution for the mentally incompetent. However, if one is out of touch with secular reality but is nevertheless considered by the state to be relatively harmless, the state may then simply classify his behavior as religious and therefore excusable. While these suggestions may themselves seem "out of it," the reader is invited to posit some rational justification for granting beyond speech free exercise of religion protection *only* to persons whose beliefs are not wholly grounded in reason or empirical observation.

Returning to Boyan's definition, we consider his statement that "the other four characteristics [(2) through (5) above] are necessarily evident only to the believer himself."²³⁹ This point is confusing in two respects. First, why is requirement (4), which involves the believer's attitude of veneration or devotion, *only* evident to the believer himself? Granted, that X is in a better position than we are to tell us what he believes. Further granted, that what X tells us he believes is of no small import in developing our conclusions as to the matter. But we may also be in a position to make a tentative but reasonable judgment about what X deems

sists of any association of practices, rituals or ceremonies intended to confirm, manifest, express or promote a belief, which for some persons is operationally religious." *Id.* at 487.

²³⁷ 156 F.2d 377, 380-81 (9th Cir.), *cert. denied*, 329 U.S. 795 (1946).

²³⁸ Boyan, *supra* note 231, at 486.

²³⁹ *Id.*

important or about whether what X says is important to him really is. We can make such inferences from observing X's behavior. Secondly, Boyan's aforementioned statement is confusing in this sense: If characteristics (2) through (5) are only evident to the believer, then they really add nothing to a purely functional definition that only inquires as to the reality of the believer's subjective commitment. For example, if it is only necessary for a deeply committed believer to state that the object of his devotion is *for him* "a final or ultimate reality," then requirement (2) in Boyan's scheme is merely a verbal one. Boyan himself seems undecided as to how subjective he means his latter four requisites to be. He appears to praise *United States v. Seeger* for reaching a definition "so as to avoid a comparison of the content of one belief with that of another."²⁴⁰ Yet (writing before *Welsh*) he also offers the following as a further explication of *Seeger*:

A zealously held belief in something does not necessarily occupy a place parallel to the belief in God; rather, the key is the relationship between the power or being or faith, on the one hand, and the universe, on the other. This relationship will have an explanatory function for the believer; it will put things in perspective much in the same way as a belief in God does. It will serve to relate the individual believer to his fellow man and the universe. Moreover, there *is* a limit to religion: it is a belief which has an explanatory force to the believers and thereby involves a reality to which everything else is subordinate or ultimately dependent.²⁴¹

What is the force of his insistence that a religious belief "will serve to relate the individual believer to his fellow man and the universe"? How much togetherness with fellow man is required? What if X's religion is *purely* individualistic and utterly oblivious to the question of relating X to other human beings? If such a religion would qualify, the "fellow man" requirement means nothing. If X's religion would not qualify, the state is imposing its own normative view of religion.

What about the relating-to-the-universe requirement? While it seems harmless enough, consider what it would do to Daniel Andrew Seeger's status as a religiously grounded conscientious objector:

The cosmic order does, perhaps, suggest a creative intelligence. But considering the natural world outside of man, with its ceaseless struggle for survival and its indiscriminate distribution of cataclysmic natural phenomena, one may doubt that this intelligence is informed with a moral purpose. Rather it would appear that in human history the principle of righteousness has emerged very gradually from man's own painful efforts, uncertain and unblest.

Personally, I do not believe that life derives any meaning from cosmic design but I do believe that a person can give his life meaning by doing something worthwhile with it, i.e., by relating his existence in a construc-

²⁴⁰ *Id.* at 496.

²⁴¹ *Id.* at 497.

tive and compassionate way to the problems of his social environment. In this sense pacifism, among other things, is for me a transcendent concern and it is in this respect that I consider myself religious.²⁴²

The above quoted statements are Seeger's own. If they do not disqualify him according to Boyan's "universe" criterion, why don't they? Is it because *Seeger* has intelligently thought through the question of cosmic morality and (perhaps tentatively) rejected the idea? What if he had simply (consciously or unconsciously) deemed the question irrelevant to his life commitments? Would this have made him *less religious*, or merely less of an abstract thinker? The conclusion with respect to all five of Boyan's criteria, except for the subjective devotion component of (4), is this: To the extent that they *add* meaning to a requirement of deep personal commitment, they are unconstitutional. They are thus constitutional only to the extent that they are superfluous to the simpler *Seeger-Welsh* formulation.

The following point is made with respect to any formulation that prefers to deem any component of a definition of religion as merely involving the "grounds for belief" rather than the "content of belief." (Boyan's first requisite is susceptible to this interpretation.) A grounds of belief versus content of belief distinction particularly lacks merit with respect to religious belief, because the grounds for belief are frequently inseparable from their content. It is, for example, part of the *content* of X's religion for him to believe (a) that his beliefs are grounded in his own reason and observation, or (b) that his beliefs are grounded solely in divine revelation contained in the Holy Bible, or (c) that his beliefs are grounded in an immediate mystical encounter with Deity, or whatever. The medium is clearly a major part of the message. For the state to limit the grounds of beliefs it will treat as religious is for the state to limit the content of beliefs it will so recognize.

The following proposed definition concludes the sampling:

An individual or group belief is religious if it occupies the same place in the lives of its adherents that orthodox beliefs occupy in the lives of their adherents. Four characteristics should be present:

- (1) a belief regarding the meaning of life;
 - (2) a psychological commitment by the individual adherent (or if a group, by the members generally) to this belief;
 - (3) a system of moral practice resulting from adherence to this belief;
- and,
- (4) an acknowledgement by its adherents that the belief (or belief system) is their exclusive or supreme system of ultimate beliefs.²⁴³

²⁴² Record at 73, 99, *United States v. Seeger*, 380 U.S. 163 (1965), *quoted in* Mansfield, *supra* note 26, at 4.

²⁴³ Comment, *Defining Religion: Of God, the Constitution and the D.A.R.*, 32 U. CHI. L. REV. 533, 550-51 (1965). One would be pleased to identify the author or authors of this excellent piece modestly labelled a "comment," but due to the utterly irrational and happily dying

This formulation closely approximates a purely functional definition; just how closely depends on nuances of interpretation. If adequate subjective commitment exists such that items (2)-(4) are satisfied, there should be no restrictive effect whatsoever from the "belief regarding the meaning of life" initial requirement. To the extent that an individual commits his life to any goal or goals, he thereby defines for himself the meaning of his life. However, the meaning of item (3), a resultant "system of moral practice," is unclear. There is first the question of whether any content is conveyed in the term "moral" other than that of the individual's choosing what *he* deems to be good. If so, the earlier-argued prohibition against limiting the content of "religious" by limiting the content of "moral" (or "conscientious") would apply. Also, one is troubled by the use of the term "system" with respect to moral practices. What content does this convey? Hopefully, none. All that requisite (3) ought to mean is that religious beliefs must be actualized to some substantial extent in the believer's life. If belief does not affect how one lives, it is not religious or, more accurately, the believer is not religiously committed to his alleged beliefs. There is ground for inferring that this is all that item (3) was meant to convey, for the writer stresses that his definition of religion "does not require any particular belief as a criterion of religion; it requires only that the belief fulfill a certain psychological function."²⁴⁴ With this interpretation, items (2), (3), and (4) are really only refinements of the requirement of subjective commitment. If the earlier-advocated prescription of varying the severity of the required degree of commitment according to the import of competing values is accepted, then requisites (2)-(4) should be understood as variable in the same way. The above four-pronged formulation is thus readily interpretable as simply a more elaborate construction of *Seeger-Welsh* (though written well before *Welsh*). The only objection to the four-pronged formulation *as thus interpreted* is that all four points should be stated so that they connote *only* the dimension of subjective adherence. As a possibility:

- (1) a belief that has meaning for the believer concerning his life;
- (2) (no alteration needed);
- (3) some reflection of the person's asserted belief(s) in his actual behavior;
- (4) an affirmation by the believer that his belief(s) constitutes all or part of *his* supreme and ultimate life concern.

If there is some foolproof formulation, this does not purport to be it. The point to be insisted upon, however, is as follows: The crucial yardstick for

tradition of not acknowledging the authorship of student law review work, no names appear with the article.

²⁴⁴ *Id.* at 551-52. "Under the definition suggested in this comment, . . . atheists (as that term is commonly understood), as well as sincere and consistent Epicureans, could be religious." *Id.* at 552-53.

judging any formulation is its clarity as a guidepost in deterring governmental decisionmakers from introducing into their religious-nonreligious delineations any sort of requirement as to the objects or grounds of belief.²⁴⁵

3. An Answer to the "Wet Blanket" Problem

The just-concluded sampling of proposed formulations has demonstrated a tendency of varying strength on the part of commentators to limit the definition of religion on the basis of the grounds or content of belief. It was earlier suggested that such limitations are advocated, at least in part, in order to avoid dampening decisionmakers' willingness to recognize free exercise exceptions to legal norms. As with the converse fear of social chaos, the fear that a broad functional definition will discourage the state from granting free exercise protection tends to be greater than the actual danger warrants. For example, it would be simply incorrect to say that under a *Seeger-Welsh* type functional definition, any asserted belief can qualify as religion. Such a statement either omits or underestimates the force of the variable subjective commitment requirement. This requirement of devotion to whatever is one's God or gods is no incidental matter. It should reduce decisionmakers' qualms about recognizing free exercise rights, for decisionmakers would know that they could utilize this requirement to exclude the superficial and the half-hearted from religious-conscientious exemptions to the extent that affected competing interests warranted their exclusion. (Such an exclusionary process is now being used in administering claims of conscientious objection to military service.) It would therefore not necessarily be the case that the number of religious exemptions from any given legal norm would be greater under this essay's interpretation of *Seeger-Welsh* than under a content restrictive definition.²⁴⁶ The number might be greater, the same, or less, depending on, among other factors, the severity of the subjective commitment standard for the scruple in question. What would and should change is that the composition of the exempted group would be deter-

²⁴⁵ The range of possibly affected governmental decisionmakers includes "the cop on the beat." Though he may appear at the bottom of the bureaucratic scheme, he makes more "legal (law enforcement) decisions" than any other official of government. See generally J. Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543 (1960).

²⁴⁶ Statistical data comparing the incidence of military conscientious objection claims in years prior to and following *Seeger* and *Welsh* would only be illuminating to the extent that a host of other factors (number of inductions, public feelings about the Southeast Asia War, etc.) have remained constant; but they have not generally done so. One would also have to take into account the actual religious belief definition (or definitions, implicit and explicit) being used at different times in different localities throughout the judicial and administrative structure. These cannot be assumed to be in accord with the prevailing pronouncement of whatever higher court may have last spoken.

mined *solely* on the basis of the intensity of objection to the legal duty in question.

The conclusion just stated does not completely dispose of the "wet blanket" problem. For some, it merely restates it. It can still be asserted that legislatures and courts simply would not be willing to recognize free exercise exemptions, even to laws lacking a compelling state interest, if *anyone deeply enough committed to not complying with such a law* could qualify for an exemption; therefore, the Supreme Court would never have recognized any right to a once-a-week holy day had it thought a Sunday afternoon professional football addict could possibly qualify. (Note, however, that our football fan may have a horrendously difficult proof-of-deep-commitment problem.) More seriously, Congress would never allow conscientious objection to military service if a "devout coward" could qualify. (Consider also, this person's proof-of-commitment problem, which would itself require a kind of courage in large dosage.) At the cost of giving these marginal examples more theoretical attention than they are apt to receive in practice, it is appropriate to attempt a resolution of the issue.

The central theme here has been that the human psyche as a determinant of external behavior deserves at least as much legal recognition in a humane society as is afforded to all sorts of other interests, tangible and intangible, sublime and ridiculous. Further, the free exercise of religion guarantee *requires* that legislatures, administrative agencies, and courts take this psyche-as-behavior-determinant into account in all decisionmaking. However, the free exercise clause and the establishment clause require that government not "discriminate between psyches" except on the following bases: (1) according to external behavior which has secularly cognizable consequences;²⁴⁷ and (2) according to the intensity of the person's commitment to behaving or not behaving in a particular way. This latter basis was earlier expressed as involving the amount of emotional pain ("spiritual pain," "psychological pain," "guilt," "anxiety") that compelling an individual to deviate from the guidance of his own "soul" (psyche) would cause.²⁴⁸

The response to the "wet blanket" argument, then, is this: *Restricting the range of objects of devotion that are legally recognizable as religion in order to encourage greater governmental recognition of religious freedom is a complete negation of the goal desired.* Any such restriction results in a special "freedom" for those religions (those way-of-life commitments) that seem conventionally proper. If, for example, one has to choose either to grant military conscientious objector status only to recognized pacifist re-

²⁴⁷ Even here there are other constitutional limitations—freedom of speech, due process, equal protection, etc.

²⁴⁸ That our capability of predicting and measuring such pain is in its infancy is readily conceded. Note, however, what future development the term "infancy" implies.

ligious groups or not to grant such status to anyone, the latter is clearly less at odds with the meaning of the first amendment. The choice then must always be between granting religious protection to *all* who have a subjective religious interest at stake in the matter and granting beyond speech religious protection to *none*. In other words, if the government is going to protect psyche freedom ("soul freedom") in the realm of external behavior, it should do so on an utterly neutral basis with respect to the content of beliefs. It thus ought *only* to discriminate with respect to: (a) subjective intensity of belief; and (b) the external consequences of overt behavior. Government does belong in the business of protecting religious freedom along with other human values. But if one has to choose between biased protection and no protection, the latter is a lesser evil than "protection" that is slanted in favor of conventional views of what is religious or conscientious.²⁴⁹

For those who flinch at a legal definition of religion based solely on subjective commitment, it must be insisted that the question of overriding importance is this: Are the first amendment religion clauses to become in a secular age merely a quaint sentimentalist memento of times past? If the definition of religion is tied to what *is now* conventionally regarded as religious, then the likelihood of any future viability for first amendment religious protections becomes problematic. The "is now" becomes "once was" almost overnight. The unprecedented rate of social change we are now experiencing has not failed to make its mark on religious existence, nor will it cease to have its effect in the future. There are few spokesmen of current religious institutions who, if pressed to utmost candor, will deny their total uncertainty as to the religious future of man (much less their uncertainty about the future of their own tradition). Somewhat akin to

²⁴⁹ A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief. Although a determination of what is a "religious" belief or practice entitled to constitutional protection may present a most delicate question, the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests. Thus, if the Amish asserted their claims [against post-eighth grade formal schooling] because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claim would not rest on a religious basis. Thoreau's choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses.

Wisconsin v. Yoder, 406 U.S. 205, 215-16 (1972). This reasoning particularly confuses the problem of defining what can be an individual's religion with the problem of maintaining necessary social control; deciding whether society's interests are important enough to override individual commitments is equally a problem, no matter whether the individual's substantive grounds for his deeply felt position are deemed utterly supernatural or utterly secular. In failing to reaffirm the open range of religion as including whatever deep commitments persons choose for themselves, Chief Justice Burger has put himself in the position of having either to propound a content restrictive definition or to assume one without telling us what it is. He seemingly has done the latter. Happily, though, the remarks quoted here are pure dicta.

some of Bonhoeffer's wonderings as to the future of religion,²⁵⁰ one might question the future of a functionally viable first amendment guarantee of religious freedom and nonestablishment if what we now conventionally regard as "religious" becomes nonexistent. The obsolescence of constitutional religious protection would be no great judicial or human tragedy *unless there is a "religious" dimension to human experience beyond "internal belief," "free speech" and "privacy" that is worthy and needful of legal protection.*

This essay has spoken of "way-of-life freedom" and of freedom of the human psyche (mind, soul, personality) not merely as an internal thought box (freedom of belief) and idea transmitter (freedom of speech, press, etc.), but freedom of the psyche *as a determinant of behavior.* These phrases are meant to connote what may be the most substantial aspect of human dignity—the freedom and responsibility of persons, within the limits of their genetic and environmental situation, *to create the content of their own lives.*

Is it merely playing word games to locate the constitutional recognition of this component of human worth in the free-exercise-of-religion clause? There are both historical and logical warrants for finding it there. What religion has meant for man and what it still denotes is the quest for the goals of living, for the purpose of one's existence. There would thus be nothing revolutionary about "finding" way-of-life freedom within the meaning of religious freedom. The only revolutionary aspect of the matter is the idea in the first amendment that government's role is one of protecting individuals' and groups' right to seek and to exercise their own religious-conscientious commitments. Such an idea seemed (and was) revolutionary in seventeenth and eighteenth century America. Freedom of religion, even at the level of belief and symbolic communication, was a matter of intense debate and controversy during our colonial existence; the attainment of the constitutional guarantee of free exercise was hardly a victory without prior battles. The reason religious freedom seems so bland and "safe" a liberty today (and one that is hardly emphasized in a "with it," "relevant" course in constitutional law) may be that we have ignored its potential impact in an increasingly secular age.

To the extent that we ignore the "secular" relevance of the free exercise clause, we deny ourselves its utility as a humane "regulator" between the state and the individual. The need for state authority is grounded in the reality that my "way-of-life freedom" must not impede unduly on your "way-of-life freedom" and vice versa. The delineation of where state compulsion ought to restrict the scope of the individual's own choices must take a host of secularly cognizable factors into account. It is axiomatic that if the state *excludes* any substantial component of human need in strik-

²⁵⁰ See generally, D. BONHOEFFER, LETTERS AND PAPERS FROM PRISON (rev. ed. 1967).

ing its balance between social control and individual liberty, the state acts unjustly. (To exclude any such component would epitomize "arbitrariness.") Yet that is exactly what the state does when it ignores the intensity of persons' commitments in prescribing their legal duties.

It may at first seem utterly fair to say, "The state will require nothing of anyone that it does not require of everyone. Either a given requirement of behavior will be compulsory for all, or the matter will be voluntary for all." Yet almost immediately, further considerations of "fairness" or "humaneness" compel us to qualify the just-stated principle by taking into account differences in age (and thus one posits some minimum and sometimes even a maximum age for certain legal duties), physical and mental health, etc. To maximize this kind of fairness-humaneness, one ought, where feasible, *also* to take into account that different individuals may vary widely in how much "psychic pain" they are apt to suffer if legally required to engage in or not to engage in particular behavior.

One is *not* advocating optimum individual liberty by arguing merely that the state should only use coercion when a compelling state interest exists. Such an over-simplification ignores a substantial category of situations in which there is enough compelling state interest to require legal coercion. (In other words, the state cannot rely on voluntary compliance to meet a certain need.) However, there is no compelling state interest to coerce those individuals who are both willing to identify themselves as religiously or conscientiously opposed to a given majority norm and, to the extent warranted by competing interests, able to prove their commitment to their deviant values. For the state to recognize this category of situations whenever they exist²⁵¹ is to maximize the scope of individual freedom, *allowing greater freedom in proportion to the importance individuals attach to particular instances of liberty*. The closer a government approaches such an ideal, the more sensitive to individual differences and feelings (and thus the more responsive to religious liberty) that government can claim to be.

It must be conceded that our present relative ignorance in ascertaining subjective commitment is an impediment to attaining the stated ideal. However, there are two qualifications to this concession. First, our present ignorance is not total. Even at a common sense level, what a person says he deems important, coupled with evidence of his behavior, provides no small clue as to what he deems of value and how strongly he feels about it. Secondly, the concession carries with it the expectation of future progress in assessing psychological commitment. Such progress should enable way-

²⁵¹ Situations already recognized in which state compulsion is deemed justified, but where religiously grounded exceptions are allowed, include military service, jury duty, nonuse of one type of narcotic (peyote), availability for Saturday work to qualify for unemployment compensation, and (in certain not yet defined instances) high schooling. See text accompanying notes 190-96 *supra*.

of-life freedom to have more rather than less viability in the future than it has had in the past. Whether our increased capacity to identify those persons most in need of stepping to a different drummer is utilized to enhance rather than to thwart individual freedom depends in part on the breadth of commitments allowed to qualify for such consideration. Hence the insistence on a view of religion whose *content* is as broad as human commitment itself.

4. A Skinnerian Postscript to a Functional Definition

This essay has grounded its insistence on a broad, functional definition of religion on the premise that government ought to protect the individual's freedom to form his own way of life. Further, it has suggested that the freedom to create the content of one's life may well be the most vital aspect of human dignity. One does not toss about such concepts as "freedom" and "dignity" without having to face B. F. Skinner's onslaught against such thinking. *Beyond Freedom and Dignity* is behaviorist Skinner's scientific *coup de grace* to the "literature of freedom and dignity" and to the "inner man."²⁵²

In briefly responding to the Skinner book, it should first be noted that Skinner's use of the term "dignity" is considerably different from the use of that word in this essay. Skinner uses the concept to refer to the conviction that individuals are "deserving" of praise for doing good and "deserving" of blame when they do evil. His concept of dignity, which he posits and then rejects, is thus one of earned merit. Dignity as earned merit is quite a different thing from dignity as *innate* human worth. The use of "human dignity" here is meant to refer to the innate value of human *qua* human, a value every person is given as an intelligent human being.

It was earlier suggested that part of innate human worth consists of man's ability to play *some* creative role, to effect *some* choice in making his life. Thus the human psyche was described as *a* determinant (not *the* determinant) of external behavior. (The psyche itself is here conceived of as partly determined, partly free.) Though this viewpoint concedes great scope to the individual's genetic and environmental history as limitations on his range of freedom, the concession is not enough to reconcile the thinking of this essay with Skinner's position, which he states as follows:

In what we may call the prescientific view . . . a person's behavior is at least to some extent his own achievement. . . . In the scientific view . . . a person's behavior is determined by a genetic endowment traceable to the evolutionary history of the species and by the environmental circumstances to

²⁵² See B. F. SKINNER, *BEYOND FREEDOM AND DIGNITY* 7-59 (1971) [hereinafter referred to as B. F. SKINNER].

which as an individual he has been exposed. Neither view can be proved, but it is the nature of scientific inquiry that the evidence should shift in favor of the second. As we learn more about the effects of the environment, we have less reason to attribute *any part* of human behavior to an autonomous controlling agent.²⁵³

Earlier in his book, Skinner stated that:

Personal exemption from a complete determinism is revoked as a scientific analysis progresses. . . .²⁵⁴

As Skinner himself must and does confess, his statement of faith in complete determinism is no more provable than is a position of finite freedom (partial determinism).²⁵⁵ He might also have added that the philosophical problems are at least as troublesome in the former as in the latter.²⁵⁶

Regardless of whether one adopts outright determinism as his working assumption, he may still conclude that the state ought to see that persons are left as free of social control in living their lives as is commensurate with the valid physical and emotional needs of others. Thus, though one rejects the reality of any psychic freedom, he might decide that the law should not impose any unnecessary uniformity on the ground that it would reduce our species' likelihood of surviving changes in environmental contingencies.²⁵⁷ This and other reasons could well lead a determinist to favor avoiding man-made controls except when needed, thus deliberately leaving individuals in substantial part subject to natural contingencies. Though the determinist's *grounds* for what is here deemed way-of-life freedom would differ from that of this essay, the *outcome* might well be the same.

The earlier discussed principle of limiting the scope of the individual's religious (way-of-life) freedom according to the import of competing interests should cause no serious Skinnerian objection. It comports with Skinner's insistence that social planning to enhance humanity's long term survival ought not to be understood as an increase in control. In the realm of economic necessity, Skinner is quite correct to claim that enlightened social planning would hardly result in increased control over the individual. Rather, instead of being controlled by irrational and arbitrary economic forces, which are often not even recognized as controls despite their effective tyranny, enlightened economic regulation would constitute a qualitative difference in the content of control. Increased social control to protect us from ecological devastation becomes a more

²⁵³ *Id.* at 101 (emphasis supplied).

²⁵⁴ *Id.* at 21.

²⁵⁵ B. F. SKINNER, *supra* note 252, contributes neither added data nor new logic to the freedom-determinism conundrum.

²⁵⁶ For a cogently reasoned attempt at positing the existence of a finite amount of freedom throughout all reality, see A. N. WHITEHEAD, *PROCESS AND REALITY*, especially at 343-45, 373-75 (1930).

²⁵⁷ Cf. Skinner's case for "planted diversification," B. F. SKINNER, *supra* note 252, at 162-63.

crucial *prerequisite for religious freedom* with each increment in technology, production, and population growth. It would thus be a gross misuse of the idea of religious freedom *qua way-of-life freedom* for it to be used to thwart social control which is reasonably needed to curtail any form of survival threatening pollution.²⁵⁸

C. Protection for "Unbelief"?

Closely related both to the matter of how broad a legal definition of religion is constitutionally required and to the perpetually haunting issue of governmental religious neutrality is the following question: *Do the first amendment religion clauses protect persons' religious "unbelief"?*

According to Justice Frankfurter, "[t]he Establishment Clause withdrew from the sphere of legitimate legislative concern and competence a specific, but comprehensive, area of human conduct: man's belief or disbelief in the verity of some transcendental idea and man's expression in action of that belief or disbelief."²⁵⁹ Justice Frankfurter's statement suggests what seems obvious enough, that the establishment clause does "protect" disbelief in transcendental claims and the expression of such disbelief in the sense that government is forbidden from lending its support to the idea of transcendent reality. The question of protecting unbelief becomes more problematic, however, in dealing with the free exercise clause. When Maryland's requirement of a declaration of belief in God by persons receiving a notary public commission or assuming other public office was invalidated, the Supreme Court reasoned as follows:

This Maryland religious test for public office unconstitutionally invades the appellant's *freedom of belief and religion* and therefore cannot be enforced against him.²⁶⁰

Despite the well-received outcome of the case, Justice Black's opinion has been questioned in some quarters for needlessly invoking the free exercise clause.²⁶¹ (Admittedly, the Maryland oath could have been voided via the establishment, free speech, due process, or equal protection clauses, or even by applying the article VI "no religious test" proviso to the states.) Burkholder faults Justice Black's use of the free exercise clause as "thus implying an equivalence of belief and disbelief in the whole sphere of First Amendment religion."²⁶² And, says Burkholder, "[t]o bring 'irreligion' into parity with religion, as construed in the First Amendment, seems to create more problems than it solves."²⁶³

²⁵⁸ Even noise pollution has become a problem of medically significant dimension.

²⁵⁹ *McGowan v. Maryland*, 366 U.S. 420, 465-66 (1961) (Frankfurter & Harlan, JJ., separate opinion).

²⁶⁰ *Torcaso v. Watkins*, 367 U.S. 488, 496 (1961) (emphasis supplied).

²⁶¹ See Burkholder, *supra* note 206, at 212-14; cf. P. KAUPER, *RELIGION AND THE CONSTITUTION* 28-29 (1964).

²⁶² Burkholder, *supra* note 206, at 214.

²⁶³ *Id.*

The alleged problem most pertinent to this essay is what Burkholder calls "the absurdity of allowing irreligious claims for immunity [from civil sanction] under the free exercise provision."²⁶⁴ It should be understood that the objection to the use of the *religion* clauses to protect "unbelief" does not suggest that governmental harassment of disbelief is constitutionally permissible. Rather, the objectors see the other first amendment guarantees and the equal protection and due process clauses as being fully sufficient to protect the right of unbelief.²⁶⁵ Sole reliance on these other constitutional protections would, however, have the effect of denying any special beyond speech free exercise protection to action or inaction based on "irreligion" or "unbelief."

Both the view that unbelief is protected by the religion clauses and the objection to this idea appear to need clarification. This could be fostered by following through with an assumption that underlies this essay's general approval of the *Seeger-Welsh* view of religion. The assumption is that *all* persons are necessarily committed to something(s). If this is so, it makes little sense to speak of religious "unbelief" except with respect to an individual's or group's explicit or implicit rejection of one or more religious positions in favor of that individual's or group's own religious stance. And it makes little sense to speak of "irreligion" or "nonreligious behavior" except with respect to that part of people's behavior not grounded in their ultimate life commitments. In other words, there may be nonreligious aspects to individual and group experience, *but there are no nonreligious people*.²⁶⁶ Such a view of man's nature is not merely playing word games, nor is it immune from strenuous attack. The idea of "making believers" (of some sort) out of everyone is particularly distasteful to those who are devout about their explicit unbeliefs. But even deeply felt "commitment to noncommitment" is a profoundly religious stance, for it may well determine one's entire way of life. For *any* individual to be required to affirm some other commitment not actually felt might well be violative of his *religious* freedom (though also violative of not explicitly religious constitutional guarantees as well).

If the foregoing has validity, then it is quite misleading to say that Justice Black's *Torcaso* opinion purported to extend free-exercise-of-religion protection to unbelief. One may certainly refuse to swear his belief in God for reasons grounded in his own religious commitment. Not concurring in what he understands the oath to mean by "belief in God," he

²⁶⁴ *Id.*

²⁶⁵ See M. HOWE, *THE GARDEN AND THE WILDERNESS* 149-76, 156-57 (1965). Included is a delightful presentation of Howe's view that the use of the religion clauses to protect unbelief is historically inaccurate.

²⁶⁶ This approach is similar to that taken by the first National Study Conference on Church and State, convened by the National Council of Churches in 1964, one year prior to the *Seeger* decision. See Wogaman, *The NCC National Study Conference on Church and State*, 1964 RELIGION AND THE PUB. ORDER 121, 143-44.

may refuse because of his own deep sense of intellectual honesty. Or, though believing in God, he might refuse on the ground that the state has no business in asking the question. Whatever his grounds, if they are deeply felt, his religious freedom is being protected by *Torcaso's* prohibition against a religious test for state office.

Characterizing all persons as religious has an obvious egalitarian function vis-à-vis the first amendment; it seeks to qualify all persons for substantive free exercise of religion protection. The subjective intensity requirement proposed in this essay is meant to be formulated and administered so as to comport as closely as possible to the ideal of equal treatment. For that reason, the intensity-of-commitment requirement was not expressed solely in terms of "how deep" or "how strong" a commitment the individual possessed. If the matter were left purely at the "how much" level, there might indeed be a class of "unbelievers," persons of "weak spirit" who lacked the "psychic power" to qualify as deeply committed to anything. Therefore, intensity of commitment has also been given an individualistic referent, being defined as the "emotional pain" *this individual* might suffer if required to violate his convictions. Thus a more fragile personality, though lacking a high degree of ascertainable fervor, could still be deemed deeply committed in the sense of being emotionally vulnerable were he required to deviate from his own scruples.²⁶⁷

The *Seeger* test itself is highly individualistic. A belief is religious if based on a faith to which all else is, *for that person*, subordinate or ultimately dependent. Intensity of commitment is thus relative to the individual person's own ordering.

There is, however, another type of individual yet to be considered—the other-directed person who has neither inner direction of his own nor subgroup allegiance that could ever place him in any stance contrary to whatever legal norms that might happen to prevail at any given time. However, even he is not properly characterized as an "unbeliever." Rather, his religion is or includes obedience to whatever society speaking through the state tells him he must do. That he would never have occasion even to consider asserting a free exercise of religion claim is due simply to the fact that he would never find the legally required behavior

²⁶⁷ This application of the subjective intensity determination does tend to overlap with physical and mental health considerations as possible factors affecting an individual's legal duties. Cf., as to compulsory military service, 32 C.F.R. § 1622.44 (1971) (Class 4-F registrants, who under applicable physical, mental, and moral standards are found to be not qualified for military service). General medical, psychiatric, and psychological testimony could hardly be deemed inappropriate in assessing the "emotional vulnerability" mode of subjective commitment where a high degree of commitment was legally required. Yet one would hope that the experts would not be put in the role of effectively making the social decisions rather than merely supplying a part of the relevant data. There is also a danger of religiously based immunity being subsumed into some such category as "emotional unfitness," etc. Not only do such categories tend to convey a stigma (however irrational), but also they tend to deny the possibility that the deviant is acting as he is by choice rather than by behavioral determinants of which he is but a passive victim.

to be in conflict with his own commitments. It is in this sense that religious exemptions, even under a neutral definition of religion, are "discriminatory"; they do excuse some persons from prescribed behavior while requiring that same behavior from others, the sole basis for the difference in treatment being the differences in the subjective commitments of each group. This discrimination is of course quite intentional. It actualizes the conviction that it is "fairer" or "more humane" to take individuals' scruples into account. This particular view of fairness or humaneness is one that many will find difficult to accept; it is apt to be least appealing to those whose behavioral inclinations conflict least with currently prevailing norms. And yet even these folks are potential religious-conscientious objectors, if future laws should conflict with their deeply felt beliefs.

D. *Religious Nonestablishment—Functionally Impossible?*

This essay has tended to emphasize the protection and enhancement of religious freedom. We now look briefly at the relationship between a broad definition like *Seeger-Welsh* and religious nonestablishment. The essay has already argued for an affinity between the establishment clause and the *Seeger-Welsh* definition in two types of situations. First, when government does grant constitutionally valid benefits (such as tax exemptions) to groups or activities conventionally recognized as religious, the establishment clause should be understood as preventing the exclusion of others from these benefits on the basis of the content of their beliefs. Second (or, if one prefers, as a special instance of the first), when government acts legislatively to protect the free exercise of religion, even when it is not constitutionally required to do so (for example, we assume, exemptions from military service in time of war), the establishment clause should be understood as requiring this: Persons who do object (with whatever showing, if any, of subjective commitment that is required) to the legal norm in question must not be excluded from a religious or conscientious exemption by virtue of the content of their beliefs. The *Seeger* and *Welsh* definitions are thus very much the fruition of the establishment clause in that they operate so as to prevent government from "picking and choosing" among religious beliefs²⁶⁸ when government acts with respect to religion as such (as, despite the establishment clause, it sometimes can do).

But what is the relationship between *Seeger-Welsh* or any functional definition of religion and the sphere of aid to religion prohibited by the establishment clause? Various commentators have noted the dilemma seemingly posed by the establishment clause vis-à-vis any definition

²⁶⁸ See *Welsh v. United States*, 398 U.S. 333, 356-58 (1970) (Harlan, J., concurring). Cf. *United States v. Seeger*, 380 U.S. 163, 175 (1965). *Seeger* and the *Welsh* plurality were of course construing § 6(j) so as to avoid this establishment problem of "prefer[ing] one religion over another" (*Everson v. Board of Educ.*, 330 U.S. 1, 15 (1947) and, arguably, so as to avoid free exercise problems as well.

of religion broad enough to include anything more than the conventionally identifiable religious bodies.²⁶⁹ If religion can involve anything capable of being the object of deep personal commitment, then the establishment clause could be read so as to prevent government from doing just about anything. Or, adopting a more "moderate" approach, any governmental action tending to inculcate ideals, values, and aspirations (the entire moral and cultural sphere of governmental activity) would be susceptible to challenge on establishment of religion grounds.

The logical consequence of even this "moderate" application of the establishment clause using a broad view of religion could finally limit government to the most obviously necessary matters of physical protection and economic regulation at some minimum level of material necessity. (And even these concerns, including decisions about what might constitute "obviously necessary matters," are inseparable from the spiritual or value-oriented sphere.) Such a "functional religious nonestablishment" would leave us with government at the federal, state, and local levels decidedly unlike what we now maintain. For example, state supported education might have to be limited to the teaching of economically, politically, and militarily (?) necessary skills. Philosophy, great literature, moral values, music and the arts would have to be left to the private sector.

At least for the foreseeable future, any extensive move to "de-spiritualize" government is apt to meet with enthusiastic disapproval. Even if a large dose of functional nonestablishment were less politically distasteful, there remains the question of its feasibility. A respectable sociological position maintains that a society will have great difficulty in functioning without some "common religion" (without a consensus of basic value orientation).²⁷⁰ If that is so, government is hardly going to become oblivious to the maintenance of some sort of unifying value structure.²⁷¹ The dilemma posed by the establishment clause and a broad view of religion is, for one reason or another, apt to remain with us.

²⁶⁹ E.g., Galanter, *Religious Freedoms in the United States: A Turning Point?*, 1966 WIS. L. REV. 217, 265-68.

²⁷⁰ Insofar as religion represents a complex of ultimate value-orientations, it can never be a neutral factor in social integration. Every functioning society has to an important degree a common religion. The possession of a common set of ideas, rituals, and symbols can supply an overarching sense of unity even in a society riddled with realistic conflicts. . . .

R. M. WILLIAMS, JR., *AMERICAN SOCIETY: A SOCIOLOGICAL INTERPRETATION* 332 (2d ed. 1965) (emphasis deleted).

²⁷¹ The ultimate foundation of a free society is the binding tie of cohesive sentiment. Such a sentiment is fostered by all those agencies of the mind and spirit which may serve to gather up the traditions of a people, transmit them from generation to generation, and thereby create that continuity of a treasured common life which constitutes a civilization.

Minersville School Dist. v. Gobitis, 310 U.S. 586, 596 (1940). See also Bellah, *Civil Religion in America*, 96 DAEDALUS 1 (1967).

With the Supreme Court already moving toward a more universal concept of religion by the beginning of the 1960's,²⁷² the dilemma was soon to receive serious scholarly attention. Writing in 1963, William Van Alstyne suggested that the Court had fashioned "a pragmatic response" to the problem by "generally defin[ing] 'religion' in two different ways under the First Amendment."²⁷³ His description of these two definitions of religion, one for the establishment clause and the other for free exercise abridgment, is as follows:

For purposes of the Establishment Clause, religion has pretty well been confined to the preachments of organized groups—which groups may attempt to manipulate the civil process to establish their own, distinct theology through the law or attempt to wrest benefits from the civil process which are of special concern to them and not shared by a cross-section of persons outside their particular church or band of churches. The laws requiring the saying of prayers or the reading of scriptures in class, for instance, are a clear example of distinct efforts at institutional religious aggrandizement, not primarily serving any needs or wants of others. More to the point, if the Court were to find such practices compatible with the Establishment Clause, such a finding would manifestly undercut the objective of the Amendment to withdraw incentives from religious organizations to exert institutional pressures on the civil process.

. . . .

Religion may be a more inclusive thing, however, when the issue is whether freedom to exercise religion has been *abridged* rather than whether religion has been established. In this connection, the Court's suggestion that "religion" is not merely co-extensive with the better established and more highly organized sects, may be taken more seriously. For while the primary (although not exclusive) concern of the Establishment Clause is to resist the importunities of distinctly institutional religious pressures, the concern of the abridgment clause is to protect *individual* prerogatives of conscience, and not merely to protect the freedom of institutionalized religion or conscience.²⁷⁴

Van Alstyne has thus placed the locus of establishment clause religion primarily in institutionalized religion—the "preachments of organized groups"—while noting that free exercise protection extends to the individual conscience. While his analysis is both accurate and helpful, it does not fully capture what has thus far been the more restrictive scope of religion understood for purposes of the establishment clause. It does not answer the question, *which* organized groups are to be deemed religious

²⁷² See *Torcaso v. Watkins*, 367 U.S. 488 (1961). This case, with its broad view of what may be deemed religion, is rightly regarded as the precursor of *Seeger-Welsh*; *id.* at 495-96n. 11.

²⁷³ Van Alstyne, *Constitutional Separation of Church and State: The Quest for a Coherent Position*, 57 AM. POL. SCI. REV. 865, 873 (1963).

²⁷⁴ *Id.* at 873-74. For other examples of a "two definition approach" see Galanter, *supra* note 269, at 265-68; *Sheldon v. Fannin*, 221 F. Supp. 766 (D. Ariz. 1963). "[I]t should be observed that lack of violation of the 'establishment clause' does not *ipso facto* preclude violation of the 'free-exercise clause.' For the former looks to the majority's concept of the term religion, the latter the minority's." *Id.* at 774-75.

groups in preventing governmental aid to religion? Nor does it tell us what activities, functions, and concerns are to be deemed religious ones. For example, Van Alstyne rightly argues that a major political objective of the establishment clause was to prevent the divisive strife caused by religious groups competing for governmental favoritism of one sort or another. Yet, how is such competition to be distinguished from divisive strife caused by competition between institutionalized music interests and physical education interests for more emphasis (more money) in a public school curriculum? Or from divisive competition between railroad interests and highway interests for greater subsidization?

To describe the establishment clause as it has functioned thus far in the nation's history, one must say that the definition of religion utilized has been restricted to groups and activities that either purport to involve supernatural or transcendent concerns, or at least are generally regarded as being religious or "spiritually" oriented. (These terms are all elusive ones and yet they or something like them must be employed in order to describe how the establishment clause has so far been employed by the Court.) It is a gross but permissible generalization to say that the establishment clause has functioned (with expectable imperfection): (1) to discourage substantial governmental aid to transcendental and other institutions or activities conventionally regarded as religious or "spiritual";²⁷⁵ and (2) to discourage the substantial participation in or the positive or negative sanctioning or special recognition by government (the "public-izing") of such activities or institutions.²⁷⁶

Religion under the establishment clause has thus been understood in a quite conventional and traditional way. The main effect of this understanding has been for the clause to function somewhat so as to "secularize" government, to divorce the this-worldly majesty of the state from explicit religious symbolism of an absolutist-transcendent dimension.²⁷⁷ There are

²⁷⁵ *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203 (1948); *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

²⁷⁶ The school prayer and Bible reading cases are a prime (if somewhat tardy) example of item (2). One may compare the two part summation of the establishment clause just stated in the text with the more elaborate and often cited rendition by Justice Black, speaking for the court in *Everson v. Board of Educ.*, 330 U.S. 1, 15-16 (1947):

The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State."

This full listing appears to comport with the two-part summary.

²⁷⁷ The divorce has been a most friendly one, however. For example, American presidents

compelling reasons for believing that this secularity of government is a good thing for the traditional religionist as well as for the secularist.

First, though the establishment clause may require the *government* to be secular, it makes no such demand of American society. The people are (happily) free in the private sector to be as nonsecular as they wish and are able to be. The free exercise clause thus serves as a counterforce to nonestablishment; it requires that secular government be "neutral" rather than anti-religious or anti-transcendent.

Second, the idea of the secularity of the state ought to be understood and appreciated as a limitation on government; it seeks to deny the state any competence in the supra-historical. It says that explicitly representing eternity, if eternity is to be so represented, is the province of individuals and voluntary groups.²⁷⁸

Third, the use of the establishment clause to prevent government aid to and meddling in transcendentalist institutions has special historical warrant. Van Alstyne rightly emphasized the political aim of discouraging the strife from pressures upon government by these institutions for all sorts of favors, direct and indirect. Having witnessed religious warring drain Europe of blood and substance for much of the prior two and one-half centuries, the proponents of nonestablishment had more than enough practical political justification for their prescription for a secular government. Although transcendentalist religious strife is not so much a problem in the United States today (at least not in comparison with other causes of conflict), the contrary situation in enough other nations is cause for us to continue adherence to the judgment of our forefathers: When political strife involving matters transcendent *does* exist, its capacity for generating bitter and irreconcilable hatred seems unparalleled.

For the foregoing reasons, any broadening of the legal understanding of what is religion should not (and need not) be allowed to invalidate or in any way to undermine the Supreme Court's continuing responsibility to uphold religious nonestablishment in the traditional sense. In other words, the existing usage of the establishment clause to discourage governmental aid to and meddling in transcendental activities and institutions continues to be justified—even though it involves a special and more narrow (and often elusive) concept of religion for this purpose. (And, at

have generally not seen fit to separate the use of explicitly transcendental language from their official role as the nation's chief of state. See Bellah, note 271 *supra*.

²⁷⁸ Of special interest to the religionist is the idea that state secularity tends to encourage religious vitality in the private sector. By protecting religious sects from state meddling, even from "helpful meddling," transcendental religion may be benefitted in the long run. The experience of the established churches in Europe tends to suggest that government aid is a mixed blessing, if a blessing at all. The move for a constitutional amendment to restore devotional activity in the public schools (or, more accurately with respect to many "civilly disobedient" public school classrooms, to legalize it) may thus be a blow rather than an aid to piety. For more than a few young people, nothing is more likely to turn them off from prayer than to tell them it is official state (or school) policy.

the cost of adding to the elusiveness of definition, one must for the sake of intuitively felt equity continue to extend these establishment prohibitions to groups who do not claim to be transcendental but who tend to be generally thought of as being religious or spiritual. The criteria for being so regarded must remain mysterious.)

The viable question is not whether a broad definition of religion should be utilized to repeal past progress of religious nonestablishment, but rather is whether such a definition should (and could) be used to give added meaning to the nonestablishment idea. Specifically, should the logic of *Seeger-Welsh* be employed with the establishment clause to restrict governmental activity in matters affecting purely secular ways of life? To accept the validity of this question is to forego any chance of ignoring the dilemma discussed at the beginning of this section. The dilemma has in fact been present throughout this essay. Earlier sections have spoken of "secularly cognizable interests" about which the state must act, such as physical security, ecological maintenance, health, etc. At the same time, it has been insisted that any of these matters can indeed be the object of an individual's religious devotion. (Few are so ascetic that mundane matters are of no consequence at all.) It has further been insisted that a person who commits his life solely to these material concerns is as legally and constitutionally entitled to be deemed religious as is the most otherworldly-minded holy man.

Using as comprehensive an understanding of religion as that favored in this essay, one is at least tentatively prone to say that the establishment of religion clause must indeed be "violated" in a relatively narrow but utterly basic domain of secular necessity. Where reasonable safety, health, material necessities, reasonable peace and quiet, and the right to self-government itself are concerned, to a significant extent there may have to be an "established" or common way of life—unless persons are to live on separate, self-sufficient islands. A definitive treatment of this problem is, however, admittedly beyond the scope of this endeavor.

Even if one concludes that some "way of life establishment" is inevitable, there is still the other side of the coin. Where there is no reasonably compelling secular necessity for doing so, might it be, at least in principle, a constitutionally impermissible establishment of religion for the state to foster a certain secular way of life over other alternatives?²⁷⁹ Whether such a principle can be made into concrete issues litigable before courts is a question to be answered by the future in general and by the creative imagination of lawyer-advocates and their clients in particular.²⁸⁰

²⁷⁹ Unlike the case with respect to transcendental and "spiritual" religion, the *Everson* idea of prohibiting aid to "all religions" might have little or even no applicability in the area of secular needs; *i.e.*, with respect to secular needs, the establishment clause might be able to do no more than to discourage unwarranted governmental preference of one way of life over another.

²⁸⁰ The following admittedly contrived example is presented only for possible heuristic val-

ue: There would indeed be secularly cognizable justification for the state to act to establish the use of public transportation, bicycles, etc., in preference to privately operated motor vehicles such as automobiles, motorcycles, snowmobiles, motor boats, airplanes, etc. These latter contrivances have become such a menace to safety, health, and quiet that their outright abolition, much less their discouragement by, for example, diverting all new road funds into funds for public transportation, would hardly be an inexcusable violation of either religion clause. However, there is no justification for the state's current policy of "establishing" private motor transportation, *e.g.*, the fact that there are few streets in any city safe for biking (in the same sense of being safe from cars, trucks, etc.). For those who deem the established religion of automobile worship contrary to their own deeply felt convictions about this aspect of their way of life, a suit to require a locality, a state or Congress to expend as much money and effort to provide safe bikeways, convenient public transportation, etc., as has been expended in aiding the established vehicular religion seems less insane than the rites observable at any rush hour. The point to be made is that the functional establishment by the state of even "secular" way-of-life uniformities that are not reasonably necessary contains disadvantages similar to traditional religious establishment, from unnecessary strife accompanying institutional competition for governmental favor to an unduly majestic government. There also exists the danger that the idea of religious freedom is compatible with an established religion, religious freedom in fact will suffer if the established religion is unduly powerful. If this is true of traditional religious establishment, it is equally true of established religion in the broad way-of-life sense.